No. 92-787

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

CLEVELAND SURGI-CENTER, INC., PLANNED PARENTHOOD ASSOCIATION OF CINCINNATI, AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., WOMEN'S PAVILLION, INC., D/B/A CENTER FOR CHOICE II, WOMEN'S MED & CENTER LTD., D/B/A WOMEN'S MED & CENTER OF DAYTON, and LEE I. RUBINSTEIN, M.D.,

Petitioners,

—v.—

STEPHANIE TUBBS JONES, and JOHN H. GIBBON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether clinics and a physician that provide abortions to minors have standing to seek prospective injunctive relief against a statute that requires parental notification before a minor obtains an abortion, where the basis of their claim is that a decision of the Ohio Supreme Court has implemented the judicial bypass in a way that deprives minors of their constitutional right to a reliable and fair adjudication of their petitions for waiver of the notification requirement.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Sixth Circuit are those in the caption.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Sixth Circuit entered on August 13, 1993.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 2 F.3d 686 (6th Cir. 1993) and is reproduced in the Appendix to this petition at p. 1a. The opinions of the District Court of the Northern District of Ohio are not reported. The District Court opinions are reproduced in the Appendix at pp. 16a and 25a, respectively.

JURISDICTION

Jurisdiction is proper pursuant to 28 U.S.C. § 1254(1) which provides for review by certiorari "upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree." An opinion and judgment was rendered by the Sixth Circuit Court of Appeals on August 13, 1993.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art III, which provides in pertinent part: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish . . . . The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution [and] the Laws of the United States . . . ."

U.S. Const. amend. XIV, which provides in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Ohio Rev. Code §§ 2151.85, 2919.12 and 2505.073[1]

STATEMENT OF THE CASE

Ohio Rev. Code §§ 2151.85, 2929.12 and 2505.073 ["the statute"] require that an unmarried, unemancipated minor notify a parent, custodian or guardian before obtaining an abortion.

This Court has held that when a state enacts such a requirement, it must protect the constitutional rights of minors by providing a fair and reliable procedure (a bypass) by which a minor may obtain a waiver of the notification requirement if she can demonstrate that she is sufficiently mature to make the abortion decision herself, or that the abortion would be in her best interests. *Bellotti v. Baird*, 443 U.S. 622, 643 (1979); *Planned Parenthood Ass'n of Kansas City, Mo. v. Ashcroft*, 462 U.S. 476, 491 (1983); *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 439-40 (1983); *Hodgson v. Minnesota*, 110 S. Ct. 2926, 2950 (1990) (O'Connor, J. concurring). The statute establishes a judicial bypass to comply with this requirement. It allows minors to petition the Ohio juvenile court for a waiver of the notification requirement.

In 1990, this Court upheld the Ohio statute as facially constitutional.[2] In so doing, it presumed that the courts of Ohio would not operate the bypass in a "worst case scenario" fashion, but that, instead, the state courts would interpret and implement the statute so as to fairly and reliably protect minors' rights. *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972, 2981-82 (1990). *See also City of Akron*, 462

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[1] The statutory provisions involved are reproduced in the Appendix at p. 29a.

[2] When this Court upheld the statute as facially constitutional, it left open the question of the statute's constitutionality as implemented. *Ohio v. Akron Center For Reproductive Health*, 110 S. Ct. 2972, 2982 (1990). *See also id.* at 2993 (Stevens, J. concurring).

U.S. at 441; *Planned Parenthood v. Ashcroft*, 462 U.S. at 491 n.16.

This has not happened. In 1990, a 17-year-old minor who was a high school student with good grades and the intent of attending college, who handled her own medical care and expenses, and who presented expert medical testimony to the Ohio juvenile court that she was sufficiently mature to make the abortion decision without parental involvement, was denied a waiver of the notification requirement, without explanation. She appealed her denial to the Ohio Supreme Court.

The Ohio Supreme Court affirmed the juvenile court's denial. *In re: Jane Doe*, 57 Ohio St. 3d 135, 566 N.E.2d 1181, Appendix at 45a (1990) (*Jane Doe I*).[3] It refused to delineate guidelines to constrain juvenile court judges in their evaluation of a minor's maturity or best interests, stating instead that this is a legislative function, 57 Ohio St.3d at 139, 566 N.E.2d at 1185, Appendix at 45a,[4] refused to require that juvenile court judges, prepare written findings setting forth their reasons for denying a waiver petition, 57 Ohio St.3d at 143-44, 566 N.E.2d at 1189, Appendix at 52a (Brown, J., dissenting); and set a highly deferential standard of appellate review of the waiver decisions. 57 Ohio St.3d at 137, 566 N.E.2d at 1184, Appendix at 43a. Applying these holdings, the court held that Jane Doe's petition could properly be denied, despite overwhelming evidence of maturity, because she had previously been pregnant and had an abortion, her two pregnancies were the results of intercourse with two different men, and she had discontinued a program of birth control. 57 Ohio St.3d at 138, 566 N.E.2d at 1184, Appendix at 44a.

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[3] The *Jane Doe I* opinion is reproduced in the Appendix at p. 39a.

[4] But *see, e.g.*, Massachusetts Rules of Court, Superior Court Standing Order 5-81 ("Uniform Procedures Regarding Petitions for Abortion Authorization . . . [including] Suggested Guidelines, Originally Set Forth in *Planned Parenthood League of Massachusetts v. Bellotti*, No. 81-124 Civil (Supreme Judicial Court for Suffolk County; Liacos, J., Single Justice) (June 16, 1981).

Jane Doe I thus implements the judicial bypass in a way that allows juvenile court judges, in the absence of legislative action, virtually unfettered discretion to deny bypass petitions for any reason whatsoever. As petitioners alleged in their complaint[5], following *Jane Doe I*, minors have been denied waivers for reasons such as not having had enough "hard knocks," Appendix at 62a, or not having disclosed a pregnancy to their parents, Appendix at 61a. Even a minor who would have been considered emancipated at common law because she already had an infant child was denied a waiver, Appendix at 61a-62a. Where appealed, these decisions were affirmed by Ohio's intermediate appellate court. The Sixth Circuit Court of Appeals acknowledged that the evidence alleged by petitioners indicated that waivers were being denied, "for reasons that might well be categorized as arbitrary." Appendix at 6a.

Petitioners are clinics and a physician who provide abortions to minors, and are subject to criminal and civil penalties for non-compliance with the statute.[6] On June 7, 1992, petitioners filed a complaint seeking declaratory and injunctive relief. Petitioners sought a declaration that Ohio's judicial bypass has been implemented in a way that violates the rights of their minor patients to a fair and reliable procedure for obtaining a waiver of the notification requirement. Petitioners sought an injunction against the prospective enforcement of the notifi-

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[5] The complaint is reproduced in the Appendix at p. 55a. Petitioners introduced these cases as evidence of their claim.

[6] The statute is enforced by the imposition of civil and criminal penalties upon any person who performs or induces an abortion upon a minor in violation of the notice or bypass requirements. A violation of these provisions constitutes a first-degree misdemeanor (or fourth degree felony in the instance of a prior conviction) *See Id.* at § 29.12(2)(D) Appendix at 36a. Further, whoever violates the notification requirement is liable to the pregnant minor and her parents for civil compensatory and punitive damages. *See Id.* at § 29.12(2)(E), Appendix at 36a. Finally, a physician who violates the statute may have his or her certificate to practice medicine limited, revoked, or suspended, or may be subject to reprimand and reprobation.

cation requirement until the defects in the bypass system were cured.[7]

Petitioners were not parties to *Jane Doe I*. Nor were they parties to the waiver proceedings subsequent to *Jane Doe I* cited in their complaint. Petitioners did not seek relief from the judgments in those state court proceedings. They sought only prospective relief.

Respondents moved to dismiss the complaint. They argued that petitioners lacked standing, and that they were improper defendants. On August 27, 1992, the district court granted respondents' motions to dismiss on grounds of standing.[8] The district court held that because petitioners had not alleged an intent to violate the statute they had not alleged a direct threat of prosecution and, therefore, had failed to establish injury in fact. Petitioners moved the court pursuant to Fed. R. Civ. P. 59(e) to reconsider and alter or, alternatively, to amend the judgment.[9] Respondents did not oppose the motion. The district court denied petitioners' Rule 59(e) motion on November 20, 1992 and confirmed that the case was dismissed with prejudice. Appendix at 28a.

On appeal, the Sixth Circuit held that the district court had erred in conditioning petitioners' standing on an announced intent to violate the statute. 2 F.3d at 687, Appendix at 4a. Nonetheless, the Sixth Circuit affirmed the dismissal of peti-

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[7] The injunction petitioners seek would presumably remain in effect until either state legislative or judicial steps are taken to ensure that only factors relevant to maturity and best interests are permissibly considered by juvenile court judges in bypass proceedings, and that the appellate process allows a reasonable likelihood of meaningful review when clearly inappropriate factors are considered.

[8] The district court declined to rule on respondents' motions as to improper parties. Appendix at 23a.

[9] Petitioners requested the opportunity to amend their complaint to assert their intention to violate the statute or, alternatively, to add or drop parties in accordance with the district court's standing ruling.

tioners' complaint. Although this issue was neither briefed nor litigated, the Sixth Circuit held that petitioners could not meet the redressability requirement necessary for standing. 2 F.3d at 691, Appendix at 11a-12a. The circuit court stated that since petitioners did not claim that all judges were making arbitrary decisions,[10] the challenged deficiency was not a "systemic" deficiency. Then the circuit court held that "[Petitioners'] real complaint is this: Certain judges are making the wrong decisions under a constitutional statute. . . . [T]here is no constitutional or statutory authority that permits a federal court to review the decisions of state courts."[11] 2 F.3d at 690-91, Appendix at 11a. Therefore, the circuit court concluded, the federal courts cannot provide redress to petitioners and therefore petitioners lack standing.

For the reasons set forth below, petitioners seek a writ of certiorari to the Sixth Circuit Court of Appeals, so that this holding may be reviewed.

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[10] The circuit also posited that juvenile court judges are "in all likelihood" already considering and discounting the factors suggested by the minor in *Jane Doe I*, and that therefore the establishment of judicial standards would not likely make a difference in the outcome of waiver proceedings. 2 F.3d at 690 n.5, Appendix at 9a n.5. These speculations are inappropriate at this stage of the proceedings, and in conflict with decisions of this Court which do not permit the equivalent of findings of fact against petitioners when the only matter before the court is a motion addressed to the pleadings that challenges standing. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976), *Havens Realty v. Coleman*, 455 U.S. 363, 377 (1982), *Lucas v. South Carolina Coastal Corp.*, 112 S. Ct. 2886, 2891 n.3 (1992).

[11] Petitioners claim that *Jane Doe I* implements the judicial bypass in a manner that deprives minors, for whom mandatory parental involvement would be an undue burden, of a fair and reliable route by which to be relieved of that burden and that, therefore, the parental notice requirement should be enjoined. Petitioners' complaint cites several decisions of the lower Ohio courts as evidence that their complaint is not hypothetical; they do not, however, seek "review" of those decisions. Appendix at 60a-62a.

REASONS FOR GRANTING THE WRIT

A WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE APPLICABLE DECISIONS OF THIS COURT AND, IN PRINCIPLE, WITH A DECISION OF ANOTHER CIRCUIT, ON AN IMPORTANT QUESTION OF FEDERAL LAW.

A. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH THE APPLICABLE DECISIONS OF THIS COURT.

In order to have standing, a plaintiff "must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (citing *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982). *See Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130, 2136 (1992). Petitioners easily meet this test.

As the Sixth Circuit acknowledged, 2 F.3d at 687, Appendix at 4a, a physician's potential civil and criminal liability under a statute provide sufficient injury in fact to confer standing. The threat of prosecution under the statute is an obviously tangible interference with petitioners' provision of medical services. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 62 (1976); *Doe v. Bolton*, 410 U.S. 179, 188 (1973) *See also City of Akron*, 462 U.S. at 440, n.30. The injunction sought by petitioners against the continued enforcement of the statute would remove that interference. Therefore, petitioners' injury is redressable. *See Larson v. Valente*, 456 U.S. 228, 244 n.15 (1982) ("a plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his *every* injury." (emphasis in original)); *Lujan*, 112 S. Ct. at 2137 ("When the suit is one

challenging the legality of government action or inaction . . . [and] the plaintiff is himself an object of the action . . . there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing . . . the action will redress it").

Moreover, the requested injunction would protect the constitutional rights of petitioners' minor patients not to be required to notify a parent, without access to a fair and reliable procedure by which to seek a waiver of that requirement. *Hodgson v. Minnesota*, 110 S. Ct. at 2950.

The Sixth Circuit treated petitioners' complaint as seeking review of state court decisions and held that, thus characterized, petitioners' complaint was not redressable because federal courts are not empowered to review state court decisions.[12] This theory of standing creates a new redressability standard that conflicts with this Court's well-settled distinction between the inability of lower federal courts to provide relief from state court judgments and their power to provide the type of prospective relief sought by petitioners pursuant to 42 U.S.C. § 1983.

Wooley v. Maynard, 430 U.S. 701 (1977), illustrates this distinction. The plaintiffs there had been prosecuted and convicted under a state statute that had been interpreted by the New Hampshire Supreme Court to apply to their conduct: masking the words "Live Free or Die" on their automobile license plates. They filed a lawsuit in federal court seeking prospective relief against further prosecutions, on the ground that the prosecutions violated their constitutional rights. This Court noted

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[12] This holding mischaracterizes petitioners' complaint. Petitioners are not seeking "direct review," 2 F.3d at 691, Appendix at 11a, (quoting *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 296 (1970)), of state court decisions. They are seeking prospective relief against enforcement of a state statute on the grounds that, under an interpretation of that statute by the Ohio Supreme Court, the statute has been implemented unconstitutionally.

the difference between seeking to re-litigate already-concluded state court prosecutions and seeking prospective relief, 430 U.S. at 711, and upheld the plaintiffs' right to seek the latter. Similarly here, where petitioners seek only prospective relief against enforcement of a statute, they should be allowed to proceed in federal court. *See also Hale v. Bimco Trading, Inc.*, 306 U.S. 375 (1939) (Affirming lower federal court injunction against enforcement of state statute, where state supreme court had previously issued writ of mandamus directing federal court defendant to enforce statute).

The Sixth Circuit relied on *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). Neither case is applicable to standing issues, and neither case is relevant to the relief that petitioners seek here: prospective relief pursuant to 42 U.S.C. § 1983.

Atlantic Coast Line enforced the anti-injunction statute, 28 U.S.C. § 2283, holding that the federal courts did not have the power to enjoin enforcement by the federal court defendant of a state court injunction that defendant had obtained against the federal court plaintiff. However, § 2283 has never been interpreted to bar injunctions against prospective enforcement of state statutes that have been interpreted in an unconstitutional way by state courts. *See, Ex Parte Young*, 209 U.S. 123, 161-162 (1907). Moreover, this Court has explicitly held that lawsuits such as this one, filed pursuant to 42 U.S.C. § 1983, are "expressly authorized" exceptions to the anti-injunction statute, *Mitchum v. Foster*, 407 U.S. 225 (1972), *Pulliam v. Allen*, 466 U.S. 522 (1984).

Feldman has always been understood to distinguish between federal court re-litigation of a concluded state court case by a party to that case, and that same party's right to obtain prospective relief, in a federal court, from further violation of constitutional rights. *See, e.g., Buckley v. Illinois Judicial Inquiry Board*, 997 F.2d 224, 227 (7th Cir. 1993) (*Feldman* no bar to

prospective injunctive relief where plaintiff "is not . . . asking for any relief of the kind an appellant seeks—relief directed against a judgment.") (Posner, J.); *Gash Associates v. Village of Rosemont, Ill.*, 995 F.2d 726, 728 (7th Cir. 1993) (*Feldman* bars federal claims that will "set aside a state judgment"; it does not bar independent legal claim that, "denies a legal conclusion that a state court has reached in a case to which [the federal plaintiff] was a party.") (Easterbrook, J.).

Petitioners, who are "strangers" to the concluded state court cases, do not seek to set aside the judgments in those cases. Nor do they seek injunctive relief against proceedings pending in the Ohio state courts. Rather, they seek injunctive relief against enforcement of the parental notification requirement because the judicial bypass, as implemented pursuant to a decision of the Ohio Supreme Court, fails to protect minors for whom mandatory parental involvement would be an undue burden.

All of the standing decisions of this Court support the conclusion that petitioners have standing to seek this relief and neither of the decisions cited by the circuit court, properly applied, supports a different conclusion.

B. THE SIXTH CIRCUIT'S DECISION CONFLICTS IN PRINCIPLE WITH A DECISION OF THE FIRST CIRCUIT COURT OF APPEALS.

In *Planned Parenthood League of Massachusetts v. Bellotti*, 868 F.2d 459 (1st Cir. 1989), (*Bellotti IV*), the First Circuit Court of Appeals was confronted with a challenge, as here, to the constitutionality of the operation of a state judicial bypass mechanism. There, although the analysis was framed in abstention terms, the First Circuit upheld the right of the plaintiffs to seek the same prospective relief petitioners seek here.

> [The] basic objective [of the plaintiffs in *Bellotti IV*] is to achieve a holding that the Massachusetts [judicial

> bypass] is, in its actual workings, unconstitutional. This remedy is a permissible one to pursue in federal court.
>
> . . .
>
> If plaintiffs succeed, what will occur is not an ongoing intermeddling with the state judiciary but a prohibition of an unconstitutional process.

868 F.2d at 465. This holding conflicts in principle with the holding of the Sixth Circuit.

The Sixth Circuit attempts to distinguish *Bellotti IV* by pointing out that the challenge there focused on "accessibility" factors, such as the unavailability of judges, to establish that the bypass placed an unconstitutional burden on minors' right to seek an abortion.[13] 2 F.3d at 690, Appendix at 9a-9b. Here, by comparison, petitioners focus their attack on rules announced in a decision of the Ohio Supreme Court that effectively grant juvenile court judges unconstrained discretion to deny bypass petitions for virtually any reason whatsoever and provide no meaningful appellate review.

Neither the standing principles established by this Court, nor the *Feldman* and *Atlantic Coast Line Railroad* line of cases cited by the Sixth Circuit, provide any support for a distinction between the First and Sixth Circuit decisions. The prospective relief petitioners seek here, like that sought in the First Circuit, would redress their injury and the infringement on the rights of their minor patients. Petitioners' claims, like those raised in the

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[13] The Sixth Circuit points out that petitioners have not alleged that all juvenile court judges are making arbitrary rulings. 2 F.3d at 690, Appendix at 10a. The same, however, was true in *Bellotti IV*, where the plaintiffs alleged only "that some state judges were de facto unavailable. . . ." *Id.* In order for a bypass to be constitutionally flawed, it is not necessary that every minor be arbitrarily denied. Instead the question should be whether the rules announced in the decision of the Ohio Supreme Court implement the process in a way that does not protect against arbitrary outcomes, and therefore does not protect minors for whom mandatory parental involvement would be an undue burden. *Hodgson v. Minnesota*, 110 S. Ct. at 2950.

First Circuit, therefore satisfy the redressability prong of the standing inquiry. As in *Wooley*, since petitioners do not seek to set aside a state court judgment in cases to which they were not parties, but seek only prospective relief, they are not barred by the *Feldman* and *Atlantic Coast Line Railroad* line of cases from proceeding in the federal courts.

C. RESOLUTION OF THIS CONFLICT IS VERY IMPORTANT TO A LARGE NUMBER OF PERSONS WHO ARE AFFECTED

Starting with *Bellotti v. Baird*, 443 U.S. 622, and continuing to *Hodgson v. Minnesota*, 110 S. Ct. 2926, this Court has consistently recognized that when a state imposes a requirement of parental involvement, a fair and reliable bypass procedure is necessary "to avoid unduly burdening" a minor's right to an abortion. *Hodgson*, 110 S. Ct. at 2950.

Twenty states now have parental involvement legislation, with judicial bypasses, in effect.[14] Thus, across the country, increasing numbers of minors must seek to vindicate their right of privacy through the bypass. It is obviously impractical, however, to expect individual minors faced with the time constraints and pressures of advancing pregnancies to litigate systemic abuses by carrying their waiver petitions not only through the entire state court appellate process but then, in search of federal court relief, by petition for certiorari to this Court. Consequently, it is imperative that those in petitioners' position be able to mount the type of challenge brought here. This rationale has always underpinned third-party standing for physicians and clinics to assert the rights of their patients. *Singleton v. Wulff*, 428 U.S. 106, 114-18 (1976).

If the holding of the Sixth Circuit stands, the ability of those such as petitioners to seek to vindicate the rights of their minor

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[14] The states of Alabama, Arkansas, Georgia, Indiana, Kansas, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, North Dakota, Ohio, Rhode Island, South Carolina, West Virginia, Wisconsin and Wyoming.

patients to fair and reliable implementation of judicial bypass procedures will be severely undercut. Thus, the holding of the Sixth Circuit presents an important federal question which this Court should review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: November 11, 1993

Respectfully submitted,

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APPENDIX

No. 92-4371

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CLEVELAND SURGI-CENTER, INC.; PLANNED PARENTHOOD ASSOCIATION OF CINCINNATI; AKRON CENTER FOR REPRODUCTIVE HEALTH, INC.; WOMEN'S PAVILLION, INC., d/b/a CENTER FOR CHOICE II; WOMEN'S MED + CENTER, LTD., d/b/a WOMEN'S MED + CENTER OF DAYTON; LEE I. RUBINSTEIN, M.D., individually and on behalf of their patients,

Plaintiffs-Appellants,

v.

STEPHANIE TUBBS JONES, in her official capacity as Cuyahoga County Prosecutor, and JOHN H. GIBBON, in his official capacity as Prosecuting Attorney for the City of Cleveland Heights, and as representatives of the class of public officials empowered to enforce the provisions of Ohio Rev. Code § 2919.12,

Defendants-Appellees.

ON APPEAL from the United States District Court for the Northern District of Ohio

Decided and Filed August 13, 1993

Before: KENNEDY and SILER, Circuit Judges; and CONTIE, Senior Circuit Judge.

KENNEDY, Circuit Judge, delivered the opinion of the court, in which SILER, Circuit Judge, joined. CONTIE, Senior Circuit Judge (pp. 13-15), delivered a separate concurring opinion.

KENNEDY, Circuit Judge. Plaintiffs appeal the dismissal of their claims challenging the constitutionality of the state of Ohio's judicial bypass system for minors seeking an abortion. On June 17, 1991, five institutional abortion providers and a physician filed a complaint in the United States District Court for the Northern District of Ohio, seeking (1) a declaration that Ohio's parental notification legislation, codified under Ohio Rev. Code Ann. §§ 2151.85, 2919.12, and 2505.073 ("the statute"), is unconstitutional as implemented, and (2) an injunction against future enforcement. Defendants in the action are Stephanie Tubbs Jones, Cuyahoga County Prosecutor, and John H. Gibbon, Prosecutor for the City of Cleveland Heights,[1] in their official capacities and as representatives of the class of public officials empowered to enforce the provisions of Ohio Rev. Code § 2919.12, which makes the performance of an abortion on a minor without parental notice or judicial authorization sanctionable.[2]

[1]The original second named defendant was Kim Segebarth, Prosecutor of the City of Cleveland Heights. However, Mr. Segebarth is the Assistant Director of Law for Cleveland Heights, under the direct supervision of the Director of Law, John H. Gibbon. Sometime after the District Court's dismissal of the complaint, Mr. Gibbon was substituted as a defendant in place of Mr. Segebarth.

[2]Section 2919.12 provides:

Defendants filed a motion to dismiss on the grounds that plaintiffs lacked standing to bring the action.[3] The District Court granted the motion to dismiss on August 27, 1992 on the grounds that plaintiffs did not allege any intention to violate the statute, and therefore, failed to demonstrate that the implementation of the statute harmed them in any way. After the District Court denied their motion to reconsider, plaintiffs timely appealed. We affirm also concluding plaintiffs lack standing but for reasons other than those stated by the District Court.

I.

Under Ohio's statute governing the regulation of minor access to abortions, unemancipated, unmarried pregnant minors are required to first notify a parent or guardian before having an abortion. If the minor wishes to have the abortion without the required notification, she may request the issuance of a judicial waiver of the notification requirement. The waiver authorizes her to consent to the performance of an abortion. Ohio Rev. Code Ann. § 2151.85. To obtain a judicial bypass, the juvenile court must find by clear and convincing evidence that the minor is mature enough to make the decision on her own, or that

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> (D) Whoever violates this section is guilty of unlawful abortion, a misdemeanor of the first degree. If the offender previously has been convicted of or pleaded guilty to a violation of this section, unlawful abortion is a felony of the fourth degree.
>
> (E) Whoever violates this section is liable to the pregnant woman and her parents, guardian, or custodian for civil compensatory and exemplary damages.

Ohio Rev. Code Ann. § 2919.12(D) and (E). In addition to these penalties, a physician who performs an unlawful abortion may have his or her certificate to practice medicine limited, revoked, or suspended, or may be subject to reprimand or probation. Ohio Rev. Code Ann. § 4731.22.

[3]Defendant Segebarth also moved to dismiss on the grounds that defendants are not proper defendants. The District Court did not rule on this motion because it dismissed the action on standing grounds.

notifying a parent is not in her best interests. The statute does not define "maturity" or "best interests." Anyone who performs an abortion on a minor who has neither notified a parent nor obtained a waiver of the notification requirement is subject to civil and criminal penalties under Ohio Rev. Code Ann. § 2919.12. The United States Supreme Court upheld the statute in its entirety in a previous facial challenge. *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990) ("*Akron II*"). Plaintiffs argue that the judicial bypass procedure is being implemented in an arbitrary fashion, in violation of pregnant minors' rights to due process through arbitrary decisions of Ohio courts that are not corrected by other appellate courts.

II.

The District Court dismissed the action on the grounds that plaintiffs lacked standing to bring the action. The court stated that if plaintiffs had alleged an intent to violate the statute, which they did not, they would have satisfied Article III's "case-or-controversy" requirement. We do not believe that the standing issue in this case is dependent upon plaintiffs' intent to violate the statute. The United States Supreme Court has held that a physician's potential for criminal liability under similar laws asserted a sufficiently direct threat of personal detriment to confer standing to challenge the *facial* validity of the abortion laws. *See Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 440 n.30 (1983) ("*Akron I*"); *Planned Parenthood v. Danforth*, 428 U.S. 52, 62 (1976); *Doe v. Bolton*, 410 U.S. 179, 188 (1973). We express no opinion on whether a physician's potential criminal liability under an abortion law that has been upheld as facially valid is sufficient to confer standing in an as applied challenge. We hold only that the District Court erred in making plaintiffs' *intent* to violate the statute determinative of their standing to bring the action. However, we conclude that plaintiffs lack standing since, as we determine below, neither we nor the District Court have jurisdiction to hear this action.

As the Supreme Court stated in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982):

> The term 'standing' subsumes a blend of constitutional requirements and prudential considerations . . . . [A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979), and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision,' *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976). In this manner does Art. III limit the federal judicial power 'to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process.' *Flast v. Cohen*, 392 U.S. 83, 97 (1968).

Id. at 471-72 (footnote omitted). In its latest pronouncement on Article III's case-or-controversy requirement, the Supreme Court examined its earlier decisions and organized the standing doctrine into a three-factor test: (1) injury in fact; (2) causation; and (3) redressability. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 3136 (1992). Similarly, this Court recently discussed the standing doctrine as composed of the same three elements. *See State of Michigan v. United States*, 994 F.2d 1197, ___ (6th Cir. 1993) ((1) "some actual or threatened injury"; (2) "that the injury is fairly trace[able] to the challenged action"; and (3) "that the injury can likely be redressed by a favorable decision." (quoting *Valley Forge Christian College*, 454 U.S. at 472)). The redressability requirement is unmet here and is determinative of this action. Because of the nature of

plaintiffs' as applied challenge, namely that state judges are making wrong factual or discretionary decisions, the alleged injury cannot be redressed and plaintiffs therefore are without standing.

III.

Plaintiffs claim that the judicial bypass procedure, as implemented, operates to deprive minors of their "constitutional right to choose to have an abortion without parental involvement." They argue that (1) the absence of guidelines on what constitutes "maturity" and "best interest"; (2) the absence of a requirement that factual findings be recorded when bypass petitions are denied; and (3) an abuse of discretion standard of review combine to give juvenile court judges virtually unfettered discretion to deny parental notice waivers. Plaintiffs allege several examples of cases where young women, age 17 or approaching that age, were denied a waiver for reasons that might well be categorized as arbitrary.

> 24. For example, a nearly 18-year-old minor petitioned the Juvenile Court in Cuyahoga County for a waiver of the notification requirement. ("*Jane Doe II*".) The Juvenile Court held that this minor was not sufficiently mature for the sole reason that she did not want to discuss her abortion decision with her parents. The Court reasoned that a mature minor would accept the consequences of her actions and disclose the matter to her parents. The Court of Appeals of Cuyahoga County affirmed the Juvenile Court's denial of the waiver.
>
> 25. Similarly, the Court of Appeals in Montgomery County in ["*Jane Doe III*"] affirmed a Juvenile Court decision denying the petition of a minor who was nearly 17 years old at the time of the hearing. She was a sophomore in high school with college aspirations, who testified that she could not go to college while raising a baby. She had been raised in foster homes during the

preceding three years with little contact with her parents. Relying on [*In re Jane Doe*, 57 Ohio St. 3d 135 (Ohio 1991) ("]*Jane Doe I*[")], the Court of Appeals, with a dissent, found that the Juvenile Court had not abused its discretion.

26. In April, 1991, the Juvenile Court of Lucas County denied the petition of a minor ("*Jane Doe IV*") on the grounds that her failure to file a paternity action against the father of her three-month-old son demonstrated a lack of maturity. Jane Doe IV was 17-1/2 years old at the time, and the mother of an infant son. She was attending high school and employed part-time. She resided with her grandmother and paid her own room and board.

27. Also in April, 1991, the Juvenile Court of Lucas County denied a minor's ("*Jane Doe V*") petition because, the presiding judge stated off the record to Jane Doe V's attorney, she had not had enough "hard knocks." Jane Doe V was 17-1/2 years old, an "A" student active in her high school's activities. She planned to go to college and testified that she would be unable to do so if she had a child at that time.

28. In January[,] 1992, the Juvenile Branch of the Franklin County Domestic Relations Court denied a minor's ("*Jane Doe VI*") petition without any explanation on the record. In an unreported ruling a divided panel of the appellate court affirmed the Franklin County Court's decision. Jane Doe VI was 17-1/2 years old, a high school student in good standing and had been accepted to college for the fall semester of 1992.

Plaintiffs allege that in an attempt to circumscribe the discretion of juvenile court judges, the minor in *Jane Doe I*, 57 Ohio St. 3d 135 (Ohio 1991), proposed that the Ohio Supreme Court adopt a six-factor test for juvenile

courts to weigh as factors that are indicative of a minor's maturity or competence to give informed consent. The minor proposed the following factors:

> a. Age. Minors fifteen and older should generally be held to possess sufficient maturity to consent to their own abortion without notice to the parent;
>
> b. Overall intelligence. The minor should possess sufficient intelligence to understand her situation and her options;
>
> c. Ability to accept responsibility. Examples could be drawn from life at home, in school or elsewhere;
>
> d. Ability to assess the future impact of her present choices;
>
> e. Whether the minor is making an affirmative personal decision and not being forced into her decision by a third person;
>
> f. Whether the minor will understand the benefits and risks of the abortion procedure and apply that understanding when making her decision.

Id. at 138-39 n.2. While the court noted that the proposed factors were factors that juvenile court judges would in all likelihood consider when reviewing a petition, it declined to adopt them or any other guidelines because it believed that to be a legislative function.[4] In

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[4] *Jane Doe I* is a 4-3 plurality opinion. One member of the plurality concurred only in the syllabus law and result. He noted that five of the six criteria proposed by the minor seemed appropriate. The three dissenting justices would have adopted standards to guide the lower courts. They believed such standards would promote consistent interpretation of the statute's "maturity" and "best interests" requirements and would allow for the development of a record that would allow for meaningful appellate review.

their complaint, plaintiffs take issue with this refusal to "constrain the lower courts."

At first glance, it appears that plaintiffs are making a vagueness challenge to the statute: due to the absence of binding guidelines on what constitutes maturity, juvenile courts are free to make and are making arbitrary decisions.[5] However, vagueness challenges are facial challenges, and such challenges are foreclosed here where the Supreme Court has held that this statute comports with due process on its face. *Akron II*, 497 U.S. 502. In any event, plaintiffs do not claim to be making a facial challenge, rather, they assert that they are challenging the statute as applied.

The Supreme Court left open the possibility of an operational challenge to a facially valid restriction on access to abortions. *See Bellotti v. Baird*, 443 U.S. 622, 645 n.25 (1979) ("*Bellotti II*"). The First Circuit has recognized that "a requirement unduly burdensome in operation will be struck down even if not clearly invalid on its face." *Planned Parenthood League v. Bellotti*, 868 F.2d 459, 469 (1st Cir. 1989) ("*Bellotti IV*") (quoting *Planned Parenthood League v. Bellotti*, 641 F.2d 1006, 1022 (1st Cir. 1981) ("*Bellotti III*")).

In *Bellotti IV*, the First Circuit allowed plaintiffs the opportunity to demonstrate the unconstitutionality of a similar parental consent/judicial bypass statute as actually implemented in Massachusetts. The court emphasized that the plaintiffs' burden was a strenuous one where, as

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[5]It is unlikely that the proliferation of guidelines would make a difference in the outcome of these decisions. The judges who are making allegedly arbitrary decisions now are in all likelihood considering these factors and discounting them. Under the statutory scheme, the minor bears the burden of proving her maturity by clear and convincing evidence. She may present evidence, including evidence covering the proposed factors in *Jane Doe I*, to show that she "is sufficiently mature and well enough informed to decide intelligently whether to have an abortion." Ohio Rev. Code Ann. § 2151.85(C)(1). It is the judges' decisions that are challenged, not the evidence before them.

here, the statute had survived a facial challenge. "More than occasional frustration, discomfort, and inconvenience would have to be shown. . . . [T]he success of an operational attack in this context requires proof of a '*systemic failure* to provide a judicial bypass option in the most expeditious, practical manner.'" *Bellotti IV*, 868 F.2d at 469 (quoting *Hodgson v. Minnesota*, 648 F. Supp. 756, 777 (D. Minn. 1986)) (emphasis added).

Unlike plaintiffs in this case, the *Bellotti IV* plaintiffs ("PPLM") alleged systemwide failures in the judicial bypass program. PPLM complained that some state judges were *de facto* unavailable to hear minors' abortion petitions because of their hostility towards abortion. The court found that the evidence of the *de facto* unavailability of certain judges was relevant to the delay in processing petitions. PPLM was prepared to offer statistical evidence of accessibility, delay, and continuances, the demeanor of judges and the trauma of petitioners that allegedly showed that in practice, the judicial bypass procedure placed an unconstitutional burden on the minors' right to seek an abortion.

Unlike PPLM's challenge in *Bellotti IV*, involving delays in the process itself that threatened to deprive minors of the bypass alternative, plaintiffs in the present case do not allege deficiencies in the access to judicial bypass decisions. They instead offer specific cases in which a certain judge arguably made an arbitrary decision. Plaintiffs do not and cannot allege that *all* Ohio juvenile court judges are implementing the statute arbitrarily. Indeed Exhibit A attached to plaintiffs' complaint reveals that in some cities like Columbus and Dayton, only 2 to 6% of the requests are denied. Additionally, under the statute, Ohio Rev. Code Ann. § 2505.073, minors faced with an arbitrary denial have a right to an expedited appeal to Ohio's appellate courts. The reviewing courts can and have overturned juvenile court decisions denying waivers. *See, e.g., In re Jane Doe*, No. 92AP-1726, 1992 Ohio App. LEXIS 6380 (Ohio Ct. App. Dec. 18, 1992). Plaintiffs do not claim

that all judges are making wrong decisions. The deficiency that they challenge is not a systemic deficiency.

Plaintiffs' real complaint is this: Certain judges are making the wrong decisions under a constitutional statute. What they are seeking is a pronouncement that when a state court makes an erroneous factual determination with respect to the maturity or best interest of a minor, it is a denial of due process. Substantive due process has never been held to extend to wrong decisions of state courts and we will not be the first to so rule. "[L]ower federal courts possess no power whatever to sit in direct review of state court decisions." *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 296 (1970). "[A] United States District Court has no authority to review final judgments of a state court in judicial proceedings. [Federal r]eview of such judgments may be had only in [the Supreme] Court." *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983). Under 28 U.S.C.A. § 1257, the Supreme Court has jurisdiction to hear appeals from state cases from the states' highest courts. "A review by the Supreme Court of a judgment or decree of a State court shall be conducted in the same manner and under the same regulations, and shall have the same effect, as if the judgment or decree reviewed had been rendered in a court of the United States." 28 U.S.C.A. § 2104 (West Supp. 1993). Federal courts are courts of limited jurisdiction. "Jurisdiction of the lower federal courts is . . . limited to those subjects encompassed within a statutory grant of jurisdiction. . . . [T]his reflects the constitutional source of federal judicial power: Apart from [the Supreme] Court, that power only exists 'in such inferior Courts as the Congress may from time to time ordain and establish.' Art. III, § 1." *Insurance Corp. v. Compagnie des Bauxites*, 456 U.S. 694, 701-02 (1982). Other than the writ of habeas corpus, *see* 28 U.S.C. § 2254, which has no application here, there is no constitutional or statutory authority that permits a federal court to review the decisions of state courts. Because we cannot redress the

alleged injuries, we hold that plaintiffs lack standing to bring this action.

"We are required to note any jurisdictional defects whether or not raised by the parties. '[E]very federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review.'" *Easley v. Pettibone Corp.*, 990 F.2d 905, 908 (6th Cir. 1993) (quoting *Greater Detroit Resource Recovery Authority v. United States Environmental Protection Agency*, 916 F.2d 317, 319 (6th Cir. 1990)). Although the District Court dismissed the action on a different standing issue, we affirm the dismissal because both we and the District Court are without jurisdiction to provide plaintiffs with the relief that they seek, namely the review of arbitrary state court decisions. "A decision below must be affirmed if correct for any reason, including a reason not considered by the lower court." *Russ' Kwik Car Wash, Inc. v. Marathon Petroleum Co.*, 772 F.2d 214, 216 (6th Cir. 1985) (per curiam) (citing *J.E. Riley Investment Co. v. Comm'r*, 311 U.S. 55, 59 (1940)).

IV.

We AFFIRM the District Court's order granting defendants' motions to dismiss.

CONTIE, Senior Circuit Judge, concurring. Though I agree with the majority's conclusion that the district court's order granting the defendants' motions to dismiss should be affirmed, I do so for the reasons articulated by the district court.

"The issue of standing, and whether a federal court has the power to adjudicate a suit, is 'the threshold question in every federal case.'" *Planned Parenthood Ass'n of Cincinnati, Inc. v. City of Cincinnati*, 822 F.2d 1390, 1394 (6th Cir. 1987) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). The standing issue involves two levels of inquiry:

> The first is of a constitutional dimension and involves determining whether the plaintiff has shown that a "case or controversy" exists between the parties as defined by Article III. This can be accomplished by proving an actual injury or injury in fact which is "likely to be redressed by a favorable decision." The second inquiry involves considering whether, as a prudential matter, the plaintiff is the proper proponent of the rights on which the action is based.

Planned Parenthood Ass'n of Cincinnati, Inc. v. City of Cincinnati, 822 F.2d at 1394 (citations omitted).

The district court dismissed the plaintiffs' action for lack of standing after finding that "the plaintiff-physicians who operate the abortion clinics in the present case have not expressed an intent to violate the statute and perform abortions on minors who have secured neither parental nor judicial consent." District Court's August 27, 1992 Memorandum Opinion at 9.

Though a physician that has never been threatened with prosecution may nevertheless gain standing to challenge the constitutionality of a state's abortion law, the physician *must* express an intent to violate the law. *See Babbitt v. United Farm Workers Nat'l Union*, 442 U.S.

289, 298 (1979) ("When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he 'should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.'") (citation omitted); *Singleton v. Wulff*, 428 U.S. 106, 113 (1976) (The physicians' complaint and affidavits "allege that they have performed and will continue to perform operations for which they would be reimbursed under the Medicaid program, were it not for the limitation of reimbursable abortions to those that are 'medically indicated.'"); *United Food & Commercial Workers Int'l v. IBP, Inc.*, 857 F.2d 422, 428 (8th Cir. 1988) ("Where plaintiffs allege an intention to engage in a course of conduct arguably affected with a constitutional interest which is clearly proscribed by statute, courts have found standing to challenge the statute, even absent a specific threat of enforcement."); *Akron Center for Reproductive Health, Inc. v. City of Akron*, 651 F.2d 1198, 1211 (6th Cir. 1981) ("[D]enial of such standing to the plaintiff-physician was properly based upon the fact that he had never even expressed a desire to perform a post-viability abortion. Thus, this plaintiff suffered 'no injury in fact.' [F]ailing to meet this requirement, the plaintiff did not have 'a sufficiently concrete interest in the outcome' of this action to make it a case or controversy under Article III of the Constitution."), *aff'd in part, rev'd in part*, 462 U.S. 416 (1983) (citations omitted).

Though a party need not subject himself to actual prosecution before bringing an action to challenge a statute, standing requires more than a theoretical possibility of prosecution. To ensure a personal stake sufficient to establish standing, there must be a real threat of prosecution. If a party does not intend to violate the statute, there can be no fear of prosecution.

Because the plaintiffs failed to allege an intent to violate Ohio's judicial bypass statute, the district court properly dismissed the plaintiffs' complaint on August 27, 1992,

and properly rejected the plaintiffs' "Motion To Reconsider And Alter, Or, Alternatively, To Amend The Judgment" on November 20, 1992.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

CASE NO. 1:92 CV 1194

CLEVELAND SURGI-CENTER INC., et al.,

Plaintiffs,

—VS.—

STEPHANIE TUBBS JONES, et al.,

Defendants.

MEMORANDUM OPINION

DOWD, J.

I. INTRODUCTION

Through this action plaintiffs, doctors operating Ohio area abortion clinics and the Akron area Planned Parenthood, challenge the application of Ohio's judicial "bypass system" as unconstitutional. The bypass system enables a minor to obtain an abortion without the consent of a parent or guardian if a juvenile judge finds the minor to be sufficiently mature to make such a request, or that an abortion would be in the best interest of the minor. Plaintiffs concede that the United States Supreme Court has already held that the bypass statute, on its face, is constitutional. *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972 (1990). The plaintiffs challenge, however, the implementation of the statute, claiming that judges have applied the statute in an arbitrary and capricious manner.

Plaintiffs have sued Cuyahoga County Prosecuting Attorney Stephanie Tubbs Jones as a representative of the class of county prosecuting attorneys who prosecute felony cases in the common pleas courts in the State of Ohio. Jones moves to dismiss the claim pursuant to Fed. R. Civ. P. 12(b)(6), (Docket No. 23). Cleveland Heights Prosecuting Attorney Kim Segebarth, who has been sued as a representative of the class of municipal courts in Ohio, has filed a similar motion, (docket No. 12). Plaintiffs have filed a consolidated response addressing both motions, (docket No. 27). Jones claims that the plaintiffs lack standing and along with Segebarth claim that they, themselves, are not proper defendants. The court finds that the plaintiffs lack standing, and grants Defendant Segebarth and Jones' motions to dismiss.

II. Factual Background

Under Ohio law, a minor must, in most instances, obtain the consent of a parent or guardian before seeking an abortion. Ohio statutory law provides for one exception to this general rule, known as "judicial bypass." O.R.C. § 2151.85. Under this procedure, a minor who wishes to have an abortion without the consent of a parent or guardian may seek the approval of a juvenile judge. If the juvenile judge determines that the minor is "sufficiently mature and well enough informed to intelligently decide whether to have an abortion without the notification of her parents, guardian, or custodians," or that an abortion is otherwise in the best interest of the minor, then the minor may proceed with the abortion without parental consent.

Ohio's judicial bypass statute was challenged in *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972 (1990). There, the United States Supreme Court held that the statute was constitutional as written. Plaintiffs challenge what they perceive as inconsistent application of the bypass statute. Plaintiffs note that the statute does not define the term "mature," nor does it provide the juvenile judge with any guidelines to assist him in determining whether the minor is sufficiently mature to obtain an abortion absent parental con-

sent. As a result, plaintiffs argue, judges are left to create their own standards which inevitably results in inconsistent applications.[1]

III. Motion to Dismiss

At the outset, the court notes that in ruling on defendants' motions to dismiss, it " 'must consider the pleadings and affidavits in a light most favorable to the plaintiff.' " *Welsh v. Gibbs*, 631 F.2d 436, 439 (6th Cir. 1980), *cert. denied*, 450 U.S. 981 (1981) (citations omitted). Also, all allegations should be taken as true. *Collins v. Nagle*, 892 F.2d 489 (6th Cir. 1989); and *Sosa v. Coleman*, 646 F.2d 991 (5th Cir. 1981).

In *Conley v. Gibson*, 355 U.S. 41 (1957), the Court set out the test for weighing the sufficiency of a 12(b)(6) motion. The Court stated:

> we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

It is with these considerations in mind that the court evaluates the defendants' motions to dismiss.

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[1] The issue of standards was visited in the Ohio Supreme Court case in *In re Doe 1*, 57 Ohio St. 3d 135 (1991). In *Doe*, the plaintiff challenged a juvenile judge's determination that she was not sufficiently mature to consent to an abortion absent parental approval. The Court held that plaintiff had failed to satisfy her burden. The Court also refused to adopt the plaintiff's suggestion of developing standards or criteria to be used by juvenile judges in determining whether a minor is "sufficiently mature." The court held:

> While appellant's proposal appears comprehensive in spelling out the various factors that juvenile court judges would in all likelihood consider when evaluating a complaint brought under R.C. § 2151.85, we decline to expand the statutory parameters enacted by the General Assembly, since such expansion would clearly involve a legislative function.

Id. at 139.

IV. Discussion

Two major issues are raised in the two motions to dismiss, the plaintiffs' standing to bring this lawsuit, and the appropriateness of county prosecutors as defendants to this action. Because the court finds that the plaintiffs lack standing, the court does not reach the issue of whether the county prosecutors are proper parties to this lawsuit.

A. *Standing*

In her motion to dismiss, Jones initially argues that the plaintiffs lack standing because they are not raising alleged violations of their own constitutional rights, but rather the rights of third parties, namely those minors who wish to have abortions without the consent of their parents. As such, defendant Jones argues that the plaintiffs have not established a case or controversy necessary to sustain an action in federal court.

"The issue of standing, and whether a federal court has the power to adjudicate a suit, is 'the threshold question in every federal case.' " *Planned Parenthood Ass'n v. City of Cincinnati*, 822 F.2d 1390, 1394 (6th Cir. 1987) *citing Warth v. Seldin*, 422 U.S. 490. 498 (1975). As the Court in *Planned Parenthood v. Cincinnati, supra.*, explained:

> Examination of the standing issue involves two levels of inquiry. The first is of a constitutional dimension and involves determining whether the plaintiff has shown that a "case or controversy" exists between the parties as defined by Article III. This can be accomplished by proving an actual injury or injury in fact which is 'likely to be redressed by a favorable decision.' The second inquiry involves considering whether, as a prudential matter, the plaintiff is the proper proponent of the rights on which the action is based.

Id. at 1394 (citations omitted).

It is a generally accepted rule that a plaintiff may only assert his own legal rights, and may not advance the rights of third parties. *Warth, supra.* at 499. There are, however, two excep-

tions to this general rule.[2] The first type involves litigants challenging statutes which regulate their conduct by infringing upon the rights of others. The second type involves litigants challenging statutes which solely infringe upon the rights of others, but where the litigants stand in a close relationship with the parties whose rights are infringed such that "the enjoyment of the right is inextricably bound up with the activity the litigants wishes to pursue." *Singleton v. Wulff*, 428 U.S. 106, 114 (1976). In order to qualify for standing under this second exception, the parties whose rights are infringed must not be able to assert the right for themselves. *Id.* at 115-116. *See also Planned Parenthood v. Cincinnati, supra.*

The court begins by examining the existence of an injury in fact. It is true that the existence of a criminal statute that operates against a litigant will, in certain circumstances, be sufficient to establish the potential for injury, and in turn, the existence of standing. *Doe v. Bolton*, 410 U.S. 179 (1972). Further, this court does not dispute the proposition that a party need not "await and undergo a criminal prosecution" before he can be said to be able to demonstrate that there exists a risk of injury. *Crossen v. Breckenridge*, 446 F.2d 833, 838 (6th Cir. 1971), *vacated on other grounds*, 410 U.S. 950 (1973).

Still, a plaintiff must demonstrate that the possibility of his or her prosecution is real. At the very least, a litigant must acknowledge an intention of committing the banned conduct, and thus, give rise to the possibility of reprisal by the government. This important aspect of the "injury in fact" requirement is emphasized in the very cases plaintiffs cite in support of their standing argument. In *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983), the Court affirmed the district court's ruling that the plaintiff, a doctor who performed abortions in abortion clinics, did not have standing to challenge an Akron, Ohio, ordinance which included, among other things, a blanket prohibition on performing abortions on minors without parental consent. While not addressed by the Supreme Court in its opinion, the court of appeals distinguished

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[2] The assertion of third party rights under these two exceptions is known as *jus tertii* standing.

the case before them from the situation in *Singleton, supra*, where the doctors were found to have standing because they indicated that they planned to violate the statute as written. The Sixth Circuit explained:

> denial of such standing to the plaintiff-physician was properly based upon the fact that he had never even expressed a desire to perform a post-viability abortion. Thus, the plaintiff suffered 'no injury in fact' from the operation of section 1870.04. Failing to meet this requirement, the plaintiff did not have a 'sufficiently concerned interest in the outcome' of this action to make it a case or controversy under Article III of the Constitution. Lacking such interest in the outcome, he did not have standing to assert the claims of others despite his claimed "close relationship" with women whom he counseled and whose rights he was seeking to protect.

Akron v. Akron Center, supra., 651 F.2d 1198, 1211 (1981) (citations omitted). The court went on find, however, that one plaintiff-physician did have standing to sue. The court held:

> The defendants dispute the standing of Dr. Bliss, the physician who remained in the case. Dr. Bliss does not reside in Akron, but has performed first trimester abortions at one of the plaintiff-clinics. He testified that he expected to continue to do so. The district court correctly held that Dr. Bliss has standing as a plaintiff in this case.

Id. at 1211.

Similarly, in another Sixth Circuit case cited by plaintiffs, *Planned Parenthood v. Cincinnati, supra.*, the court found standing because Planned Parenthood had indicated that it planned to violate the statute. The court noted that:

> Planned Parenthood has alleged its intention to engage in conduct arguably affected with a constitutional interest, and we believe the statutory language of the Ordinance evinces a credible threat of prosecution against Planned Parenthood. Accordingly, we find that Planned Parenthood meets the 'injury in fact' requirement of standing.

Id. at 1396.[3] *See also* the recent decision of *Ohio v. Akron Center, supra.*[4]

Unlike the plaintiffs in *Planned Parenthood* and *Akron Center*, the plaintiff-physicians who operate the abortion clinics in the present case have not expressed an intent to violate the statute and perform abortions on minors who have secured neither parental nor judicial consent. Through this suit, plaintiffs have advanced merely their dissatisfaction with the statute. Disapproval of a particular law, however, is insufficient to establish the injury in fact requirement of standing. Plaintiffs argue that they have standing because the statute visits upon them criminal penalties if they violate it.[5] There is no threat of prosecution, however, if the plaintiffs have no intention of ever violating the statute; and therefore, there is no standing. The

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[3] In support of its position that the plaintiff-physicians had satisfied the injury in fact requirement of standing by announcing their intent to violate the statute, the court stated:

> More recently, the Court stated that when a plaintiff 'has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he 'should not be required to await and undergo a criminal prosecution as the sole means of seeking relief'.

Planned Parenthood v. Cincinnati, supra. at 1396, *quoting Babbit v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979).

[4] The Court upheld the district court's finding of standing for a physician performing abortions in Akron. As the district court noted, the plaintiff/physician asserted that he would be subjected to criminal and civil penalties as a result of the Ohio statute. 633 F. Supp. 1123, 1127 (1986).

[5] O.R.C. § 2919.12 states in relevant part:

> (D) Whoever violates this section [by performing an abortion on a minor without parental or judicial consent] is guilty of unlawful abortion, a misdemeanor of the first degree. If the offender previously has been convicted of or pleaded guilty to a violation of this section, unlawful abortion is a felony of the fourth degree.
>
> (E) Whoever violates this section is liable to the pregnant woman and her parents, guardian, or custodian for civil compensatory and exemplary damages.

court finds that the plaintiffs lack standing, and grants defendants' motions to dismiss.

B. *Improper defendant.*

Both Segebarth and Jones argue that they are not proper parties to this lawsuit. Since the court has determined that the plaintiffs lack standing to bring this lawsuit, the court need not rule on this aspect of the motions.

V. Conclusion

For the foregoing reasons, the court finds that the plaintiffs lack standing, and rules that defendant Segebarth and Jones' motions to dismiss are granted. This case is dismissed.

It is so Ordered.

/s/ David D. Dowd, Jr.
David D. Dowd, Jr.
U.S. District Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

CASE NO. 1:92 CV 1194

CLEVELAND SURGI-CENTER INC., et al.,

Plaintiffs,

—VS.—

STEPHANIE TUBBS JONES, et al.,

Defendants.

DOWD, J.

JUDGMENT ENTRY

For the reasons set forth in the Memorandum Opinion filed contemporaneously with this Judgment Entry, IT IS HEREBY ORDERED, ADJUDGED and DECREED that the motions of defendants Segebarth and Jones to dismiss are granted. This case is dismissed.

/s/ DAVID D. DOWD, JR.
David D. Dowd, Jr.
U.S. District Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

CASE NO. 1:92 CV 1194

Filed November 20, 1992

CLEVELAND SURGI-CENTER INC., et al.,

Plaintiffs,

—VS.—

STEPHANIE TUBBS JONES, et al.,

Defendants.

ORDER

DOWD, J.

Plaintiffs, doctors operating Ohio area abortion clinics and the Akron area Planned Parenthood, brought this action on June 17, 1992 challenging the constitutionality of Ohio's judicial "bypass system" as applied to minors in Ohio. The bypass system enables a minor to obtain an abortion without the consent of a parent or guardian if a juvenile judge finds the minor to be sufficiently mature to make such a request, or finds that an abortion would be in the best interest of the minor. Plaintiffs claim that the application of this statute by juvenile judges has been capricious and arbitrary rendering it unconstitutional as applied.

In an Order dated August 27, 1992, the Court dismissed this action on standing grounds. The Court held that the plaintiff

physicians and clinic operators did not set forth a sufficient case or controversy because they did not allege that they, themselves, planned to violate the statute. The Court held that "[a]t the very least, a litigant must acknowledge an intention of committing the banned conduct, and thus, give rise to the possibility of reprisal by the government."

Plaintiffs have now moved the Court to reconsider its August 27, 1992 Order dismissing this action, or in the alternative, to amend the judgment to permit a dismissal without prejudice, (docket No. 32). Plaintiffs supplemented this motion on November 17, 1992, (docket No. 33). Plaintiffs' motion for reconsideration and their alternative motion to amend the judgment to reflect a dismissal without prejudice are denied.

In support of their motion for reconsideration, plaintiffs argue, relying on *Akron v. Akron Center for Reproduction Health*, 426 U.S. 416 (1983) and *Planned Parenthood Ass'n v. City of Cincinnati*, 822 F.2d 1390 (6th Cir. 1987), that a party need only be potentially subject to prosecution under a statute to have standing to challenge the statute. Plaintiffs claim that because they engage in a business that is subject to regulation under the statute they have advanced a sufficient threat of prosecution.

It is true that a party "need not necessarily subject himself to actual prosecution under a penal statute before bringing a federal action challenging that statute." *Planned Parenthood v. Cincinnati, supra*, at 1395. Standing, however, requires more than a theoretical possibility of prosecution. To ensure a personal stake sufficient to establish standing, there must be a real threat of prosecution. If a party has no intention of violating the statute, then there can be no fear of prosecution. "Persons who have no fear of prosecution except that are imaginary or speculative, are not to be accepted as appropriate plaintiffs." *Younger v. Harris*, 401 U.S. 37, 42 (1971).

In *Younger v. Harris*, the plaintiffs were found to lack standing because they had not been indicted, arrested, or threatened with prosecution, nor had they alleged that prosecution was likely. Further, the Court went on to hold that had the plaintiffs alleged that they planned to violate the statute, and had the dis-

trict court found the allegations to be true, then standing may have existed.

In relying on *Younger*, the court in *Planned Parenthood v. Cincinnati* noted that the plaintiff-physicians and clinic operators had expressed their intention to engage in conduct which might violate the city's fetal disposal ordinance. This, the court held, was sufficient to establish a "credible threat of prosecution."

Similarly, in *Akron v. Akron Center*, the Court upheld the district court's denial of standing to a doctor who performed abortions to challenge Akron, Ohio's abortion ordinance. While the Supreme Court did not comment on the standing issue, the Sixth Circuit explained:

> denial of such standing to the plaintiff-physician was properly based upon the fact that he had never even expressed a desire to perform a post-viability abortion. Thus, the plaintiff suffered 'no injury in fact' from the operation of section 1870.04. Failing to meet this requirement, the plaintiff did not have a 'sufficiently concerned interest in the outcome' of this action to make it a case or controversy under Article III of the Constitution. Lacking such interest in the outcome, he did not have standing to assert the claims of others despite his claimed "close relationship" with women whom he counseled and whose rights he was seeking to protect.

Akron v. Akron Center, supra, 651 F.2d 1198, 1211 (1981).[1] Thus, in *Akron v. Akron Center*, the plaintiff-physician was held to lack standing even though he was engaged in a business that was regulated by the ordinance.

Like the plaintiff-physician in *Akron v. Akron Center*, the plaintiffs in the present case will suffer 'no injury in fact' from the operation of the judicial bypass statute if they choose not to violate it. The decision not to violate the statute removes all

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[1] It should be noted that the one plaintiff-physician who was found to have standing to sue testified that he intended to continue to violate the statute.

threat of prosecution. Absent this threat, plaintiffs lack the personal stake necessary to establish standing.[2]

Plaintiffs argue in the alternative that the Court's August 27, 1992 judgment should be amended so that the dismissal is granted without prejudice. Plaintiffs suggest that there exists the possibility that, granted leave, the Complaint could be amended and the absence of standing corrected.[3] The present posture of this case is that it is dismissed with prejudice.

It would be inappropriate for the Court to allow the plaintiffs to amend a complaint that has been dismissed on standing grounds. This case was not, however, dismissed on the merits. The plaintiffs are free to correct the standing deficiency and file a new case.

For the foregoing reasons, plaintiffs' motion for reconsideration and plaintiffs' motion to alter the August 27, 1992 judgment dismissing this matter with prejudice are denied. The case remains dismissed with prejudice.

IT IS SO ORDERED.

/s/ DAVID D. DOWD, JR.
David D. Dowd, Jr.
U.S. District Judge

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[2] The Court notes that plaintiffs are unable to cite any case where an abortion clinic or a doctor performing abortions in a clinic was found to have standing absent a declaration that the actor planned to violate the statute in question.

[3] Plaintiffs state that, if granted leave, they may assert their own intentions to violate the statute. Plaintiffs also suggest that "parties may be added and dropped in order to achieve harmony with the Court's ruling as to standing."

§ 2151.85 Unmarried minor may seek abortion without notice to parent, guardian or custodian.

(A) A woman who is pregnant, unmarried, under eighteen years of age, and unemancipated and who wishes to have an abortion without the consent of her parents, guardian or custodian may file a complaint in the juvenile court of the county in which she has a residence or legal settlement, in the juvenile court of any county that borders to any extent the county in which she has a residence or legal settlement, or in the juvenile court of the county in which the hospital, clinic or other facility in which the abortion would be performed or induced is located, requesting the issuance of an order authorizing her to consent to the performance or inducement of an abortion without the notification of her parents, guardian or custodian.

The complaint shall be made under oath and shall include all of the following:

(1) A statement that the complainant is pregnant;

(2) A statement that the complainant is unmarried, under eighteen years of age and unemancipated;

(3) A statement that the complainant wishes to have an abortion without the notification of her parents, guardian, or custodian;

(4) An allegation of either or both of the following:

(a) That the complainant is sufficiently mature and well enough informed to intelligently decide whether to have an abortion without the notification of her parents, guardian, or custodian;

(b) That one or both of her parents, her guardian, or her custodian was engaged in a pattern of physical, sexual, or emotional abuse against her, or that the notification of her parents, guardian, or custodian otherwise is not in her best interest.

(5) A statement as to whether the complainant has retained an attorney and, if she has retained an attorney, the name, address, and telephone number of her attorney.

(B)(1) The court shall fix a time for a hearing on any complaint filed pursuant to division (A) of this section and shall keep a record of all testimony and other oral proceedings in the action. The court shall hear and determine the action and shall not refer any portion of it to a referee. The hearing shall be held at the earliest possible time, but not later than the fifth business day after the day that the complaint is filed. The court shall enter judgment on the complaint immediately after the hearing is concluded. If the hearing required by this division is not held by the fifth business day after the complaint is filed, the failure to hold the hearing shall be considered to be a constructive order of the court authorizing the complainant to consent to the performance or inducement of an abortion without the notification of her parent, guardian, or custodian, and the complainant or any other person may rely on the constructive order to the same extent as if the court actually had issued an order under this section authorizing the complainant to consent to the performance or inducement of an abortion without such notification.

(2) The court shall appoint a guardian ad litem to protect the interests of the complainant at the hearing that is held pursuant to this section. If the complainant has not retained an attorney, the court shall appoint an attorney to represent her. If the guardian ad litem is an attorney admitted to the practice of law in this state, the court also may appoint him to serve as the complainant's attorney.

(C)(1) If the complainant makes only the allegation set forth in the division (A)(4)(a) of this section and if the court finds, by clear and convincing evidence, that the complainant is sufficiently mature and well enough informed to decide intelligently whether to have an abortion, the court shall issue an order authorizing the complainant to consent to the performance or inducement of an abortion without the notification of her parents, guardian, or custodian. If the court does not make

the finding specified in this division, it shall dismiss the complaint.

(2) If the complainant makes only the allegation set forth in the division (A)(4)(b) of this section and if the court finds, by clear and convincing evidence, that there is evidence of a pattern of physical, sexual, or emotional abuse of the complainant by one or both of her parents, her guardian or her custodian, or that the notification of the parents, guardian, or custodian is not in the best interest of the complainant, the court shall issue an order authorizing the complainant to consent to the performance or inducement of an abortion without the notification of her parents, guardian, or custodian. If the court does not make the finding specified in this division, it shall dismiss the complaint.

(3) If the complainant makes both of the allegations set forth in divisions (A)(4)(a) and (b) of this section, the court shall proceed as follows:

(a) The court shall first determine whether it can make the finding specified in division (C)(1) of this section and, if so, shall issue an order pursuant to that division. If the court issues such an order, it shall not proceed pursuant to division (C)(3)(b) of this section. If the court does not make the finding specified in division (C)(1) of this section, it shall proceed pursuant to division (C)(3)(b) of this section.

(b) If the court pursuant to division (C)(3)(a) of this section does not make the finding specified in division (C)(1) of this section, it shall proceed to determine whether it can make the finding specified in division (C)(2) of this section and, if so, shall issue an order pursuant to that division. If the court does not make the finding specified in section (C)(2) of this section, it shall dismiss the complaint.

(D) The court shall not notify the parents, guardian, or custodian of the complainant that she is pregnant or that she wants to have an abortion.

(E) If the court dismisses the complaint, it immediately shall notify the complainant that she has a right to appeal under section 2505.073 [2505.07.3] of the Revised Code.

(F) Each hearing under this section shall be conducted in a manner that will preserve the anonymity of the complainant. The complaint and all other papers and records that pertain to an action commenced under this section shall be kept confidential and are not public records under section 149.43 of the Revised Code.

(G) The clerk of the supreme court shall prescribe complaint and notice of appeal forms that shall be used by a complainant filing a complaint under this section and by an appellant filing an appeal under section 2505.073 [2505.07.3] of the Revised Code. The clerk of each juvenile court shall furnish blank copies of the forms, without charge, to any person who requests them.

(H) No filing fee shall be required of, and no court costs shall be assessed against, a complainant filing a complaint under this section or an appellant filing an appeal under section 2505.073 [2505.07.3] of the Revised Code.

(I) As used in this section, "unemancipated" means that a woman who is unmarried and under eighteen years of age has not entered the armed services of the United States, has not become employed and self-subsisting, or has not otherwise become independent from the care and control of her parent, guardian, or custodian.

. . .

[§ 2505.07.3] § 2505.073 Minor may appeal denial of abortion without notice to parent, guardian or custodian.

(A) A complainant whose complaint under section 2151.85 of the Revised Code is dismissed by a juvenile court, may

appeal in accordance with this section. Within four days after a notice of appeal is filed in an action arising under that section, the clerk of the juvenile court shall deliver a copy of the notice of appeal and the record on appeal to the clerk of the court of appeals named in the notice. Upon receipt of the notice and record, the clerk of the court of appeals shall place the appeal on the docket of the court.

The appellant shall file her brief within four days after the appeal is docketed. Unless the appellant waives the right to oral argument, the court of appeals shall hear oral argument within five days after the appeal is docketed. The court of appeals shall enter judgment in the appeal immediately after the oral argument or, if oral argument has been waived, within five days after the appeal is docketed.

No filing fee shall be required of, and no court costs shall be assessed against, an appellant who appeals under this section.

Upon motion of the appellant and for good cause shown, the court of appeals may shorten or extend any of the maximum times set forth in this division. However, in any case, if judgment is not entered within five days after the appeal is docketed, the failure to enter the judgment shall be considered to be a constructive order of the court authorizing the appellant to consent to the performance or inducement of an abortion without the notification of her parent, guardian, or custodian, and the appellant and any other person may rely on the constructive order to the same extent as if the court actually had entered a judgment under this section authorizing the appellant to consent to the performance or inducement of an abortion without such notification.

In the interest of justice, the court of appeals, in an appeal in accordance with this section, shall liberally modify or dispense with the formal requirements that normally apply as to the contents and form of an appellant's brief.

(B) All proceedings under division (A) of this section shall be conducted in a manner that will preserve the anonymity of the appellant on appeal. All papers and records that pertain to an appeal under this section shall be kept confidential and are not public records under section 149.43 of the Revised Code.

. . .

§ 2919.12 [Unlawful abortion.]

(A) No person shall perform or induce an abortion without the informed consent of the pregnant woman.

(B)(1)(a) No person shall knowingly perform or induce an abortion upon a woman who is pregnant, unmarried, under eighteen years of age, and unemancipated unless at least one of the following applies:

(i) Subject to division (B)(2) of this section, the person has given at least twenty-four hours actual notice, in person or by telephone, to one of the woman's parents, her guardian, or her custodian as to the intention to perform or induce the abortion, provided that if the woman has requested, in accordance with division (B)(1) of this section, that notice be given to a specified brother or sister of the woman who is twenty-one years of age or older or to a specified stepparent or grandparent of the woman instead of to one of her parents, her guardian, or her custodian, and if the person is notified by a juvenile court that affidavits of the type described in that division have been filed with that court, the twenty-four hours actual notice described in this division as to the intention to perform or induce the abortion shall be given, in person or by telephone, to the specified brother, sister, stepparent or grandparent instead of the parent, guardian, or custodian;

(ii) One of the woman's parents, her guardian, or her custodian has consented in writing to the performance or inducement of the abortion;

(iii) A juvenile court pursuant to section 2151.85 of the Revised Code issues an order authorizing the woman to consent to the abortion without notification of one of her parents, her guardian, or her custodian;

(iv) A juvenile court or a court of appeals, by its inaction, constructively has authorized the woman to consent to the abortion without notification of one of her parents, her guardian, or

her custodian under division (B)(1) of section 2151.85 or division (A) of section 2505.073 [2505.07.3] of the Revised Code.

(b) If a woman who is pregnant, unmarried, under eighteen years of age, and unemancipated desires notification as to a person's intention to perform or induce an abortion on the woman to be given to a specified brother or sister of the woman who is twenty-one years of age or older or to a specified stepparent or grandparent of the woman instead of to one of her parents, her guardian, or her custodian, the person who intends to perform or induce the abortion shall notify the specified brother, sister, stepparent, or grandparent instead of the parent, guardian, or custodian for purposes of division (A)(1)(a)(i) of this section if all of the following apply:

(i) The woman has requested the person to provide the notification to the specified brother, sister, stepparent, or grandparent, clearly has identified the specified brother, sister, stepparent, or grandparent and her relation to that person, and, if the specified relative is a brother or sister, has indicated the age of the brother or sister:

(ii) The woman has executed an affidavit stating that she is in fear of physical, sexual, or severe emotional abuse from the parent, guardian, or custodian who otherwise would be notified under division (B)(1)(a)(i) of this section, and that the fear is based on a pattern of physical, sexual, or severe emotional abuse of her exhibited by that parent, guardian, or custodian, has filed the affidavit with the juvenile court of the county in which the woman has a residence or legal settlement, the juvenile court of any county that borders to any extent the county in which she has a residence or legal settlement, or the juvenile court of the county in which the hospital, clinic, or other facility in which the abortion would be performed or induced is located, and has given the court written notice of the name and address of the person who intends to perform or induce the abortion;

(iii) The specified brother, sister, stepparent, or grandparent has executed an affidavit stating that the woman has reason to fear physical, sexual, or severe emotional abuse from the par-

ent, guardian, or custodian who otherwise would be notified under division (B)(1)(a)(i) of this section, based on a pattern of physical, sexual, or severe emotional abuse of her by that parent, guardian, or custodian, and the woman or the specified brother, sister, stepparent, or grandparent has filed the affidavit with the juvenile court in which the affidavit described in division (B)(1)(b)(ii) of this section was filed:

(iv) The juvenile court in which the affidavits described in divisions (B)(1)(b)(ii) and (iii) of this section were filed has notified the person that both of those affidavits have been filed with the court.

(c) If an affidavit of the type described in division (B)(1)(b)(ii) of this section and an affidavit of the type described in division (B)(1)(b)(iii) of this section are filed with a juvenile court and the court has been provided with written notice of the name and address of the person who intends to perform or induce an abortion upon the woman to whom the affidavits pertain, the court promptly shall notify the person who intends to perform or induce the abortion that the affidavits have been filed. If possible, the notice to the person shall be given in person or by telephone.

(2) If division (B)(1)(a)(ii), (iii), or (iv) of this section does not apply, and if no parent, guardian, or custodian can be reached for purposes of division (B)(1)(a)(i) of this section after a reasonable effort, or if notification is to be given to a specified brother, sister, stepparent, or grandparent under that division and the specified brother, sister, stepparent, or grandparent cannot be reached fur purposes of that division after a reasonable effort, no person shall perform or induce such an abortion without giving at least forty-eight hours constructive notice to one of the woman's parents, her guardian, or her custodian, by both certified and ordinary mail sent to the last known address of the parent, guardian, or custodian, or if notification for purposes of division (B)(1)(a)(i) of this section is to be given to a specified brother, sister, stepparent, or grandparent, without giving at least forty-eight hours constructive notice to that specified brother, sister, stepparent, or grand-

parent by both certified and ordinary mail sent to the last known address of that specified brother, sister, stepparent, or grandparent. The forty-eight hour period under this division begins when the certified mail notice is mailed. If a parent, guardian, or custodian of the woman, or if notification under division (B)(1)(a)(i) of this section is to be given to a specified brother, sister, stepparent, or grandparent, the specified brother, sister, stepparent, or grandparent, is not reached within the forty-eight hour period, the abortion may proceed even if the certified mail notice is not received.

(3) If a parent, guardian, custodian, or specified brother, sister, stepparent, or grandparent who has been notified in accordance with division (B)(1) or (2) of this section clearly and unequivocally expresses that he or she does not wish to consult with a pregnant woman prior to her abortion, then the abortion may proceed without any further waiting period.

(4) For purposes of prosecutions for a violation of division (B)(1) or (2) of this section, it shall be a rebuttable presumption that a woman who is unmarried and under eighteen years of age is unemancipated.

(C)(1) It is an affirmative defense to a charge under division (B)(1) or (2) of this section that the pregnant woman provided the person who performed or induced the abortion with false, misleading, or incorrect information about her age, marital status, or emancipation, about the age of a brother or sister to whom she requested notice be given as a specified relative instead of to one of her parents, her guardian, or her custodian, or about the last known address of either of her parents, her guardian, her custodian, or a specified brother, sister, stepparent, or grandparent to whom she requested notice be given and the person who performed or induced the abortion did not otherwise have reasonable cause to believe the pregnant woman was under eighteen years of age, unmarried, or unemancipated, to believe that the age of a brother or sister to whom she requested notice be given as a specified relative instead of to one of her parents, her guardian, or her custodian was not twenty-one years of age, or to believe that the last known

address of either of her parents, her guardian, her custodian, or a specified brother, sister, stepparent, or grandparent to whom she requested notice be given was incorrect.

(2) It is an affirmative defense to a charge under this section that compliance with the requirements of this section was not possible because an immediate threat of serious risk to the life or physical health of the pregnant woman from the continuation of her pregnancy created an emergency necessitating the immediate performance or inducement of an abortion.

(D) Whoever violates this section is guilty of unlawful abortion, a misdemeanor of the first degree. If the offender previously has been convicted of or pleaded guilty to a violation of this section, unlawful abortion is a felony of the fourth degree.

(E) Whoever violates this section is liable to the pregnant woman and her parents, guardian, or custodian for civil compensatory and exemplary damages.

(F) As used in this section "unemancipated" means that a woman who is unmarried and under eighteen years of age has not entered the armed service of the United States, has not become employed and self-subsisting, or has not otherwise become independent from the care and control of her parent, guardian, or custodian.

SUPREME COURT OF OHIO

No. 90-2274

IN RE: JANE DOE 1.

57 OHIO ST. 3d 135; 566 N.E.2d 1181;

December 11, 1990, Submitted
December 11, 1990, Decided
January 24, 1991, Announced

Appeal from the Court of Appeals for Hamilton County, No. C-900825.

Judgment affirmed.

Absent an abuse of discretion by the juvenile court, the dismissal of a complaint brought by an unemancipated pregnant minor seeking authorization to have an abortion pursuant to R.C. 2151.85, shall not be disturbed.

Appellant, "Jane Doe,"[1] is a seventeen-year-old female minor living with her parents in Hamilton County. On November 8, 1990, appellant file this action in the Court of Common Pleas of Hamilton County, Juvenile Division, seeking court approval to have an abortion without notification to her parent, guardian or custodian. In her complaint, appellant alleged that she is sufficiently mature and well enough informed to intelligently decide whether to have an abortion without parental notifica-

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[1] R.C. 2151.85(F) provides in relevant part that "each hearing under this section shall be conducted in a manner that will preserve the anonymity of the complainant. . . ."

tion, and further, that parental notification of her desire to have an abortion would not be in her best interest.

A hearing was held by the court on November 13, 1990, wherein appellant testified on her own behalf along with an expert witness, Dr. Joseph Rauh, who is the director of the Division of Adolescent Medicine at Children's Hospital Medical Center in Cincinnati. At the hearing, appellant testified that she is a senior in high school and maintains a 3.0 grade point average. Appellant has been involved in sports in high school, plans to attend college and has worked in various jobs since she was sixteen. Appellant further testified that she is responsible for obtaining her own medical care. In June 1990, appellant had an abortion with her mother's consent but without her father's knowledge. Appellant testified that she feared that her father would beat her if he found out she is pregnant and wants to obtain an abortion, and that her mother would tell her father if her mother knew that appellant had become pregnant again. Appellant also testified that her father had struck her in the past for coming home late at night and for having a bad report card from school.

Dr. Rauh testified that he believes that appellant understands the risks of obtaining an abortion, and that letting her decide whether to have an abortion without parental notification was consistent with good medical judgment.

At the conclusion of the testimony, the court held that appellant was ". . . not sufficiently mature to make a judgment called for by . . . [R.C. 2151.85]." The court further found ". . . that there is not sufficient evidence of a pattern of physical, or sexual abuse, or emotional abuse of the complainant by her father or her mother so that notification of one of them will produce the threat that is alleged. . . ." The court therefore dismissed the complaint.

Upon appeal, the court of appeals affirmed, finding that the evidence supported the trial court's finding that appellant failed to prove the allegations of her complaint by clear and convincing evidence.

The cause is now before this court pursuant to the allowance of a motion to certify the record.

Alphonse A. Gerhardstein, for appellant.

Sweeney, *J.* Holmes and Resnick, *JJ.*, concur. Wright, *J.*, concurs in the syllabus and judgment only. Moyer, *C.J.*, Douglas and H. Brown, *JJ.*, dissent.

SWEENEY, *J.*:

The determinative issue before us is whether the court of appeals was correct in affirming the dismissal of appellant's complaint seeking authorization to obtain an abortion without parental notification pursuant to R.C. 2151.85. Stated differently, we must determine whether the trial court abused its discretion in finding that appellant did not prove by clear and convincing evidence that: (1) she is sufficiently mature and well enough informed to decided whether to have an abortion without parental notification: and/or (2) that parental notification of her desire to have an abortion is not in her best interest. Since we find that the trial court did not abuse its discretion in ruling as it did, we affirm the judgment of the court of appeals below.

R.C. 2151.85 provides in pertinent part:

"(A) A woman who is pregnant, unmarried, under eighteen years of age, and unemancipated and who wishes to have an abortion without the notification of her parents, guardian, or custodian may file a complaint in the juvenile court of the county in which she has a residence or legal settlement, in the juvenile court of any county that borders to any extent the county in which she has a residence or legal settlement, or in the juvenile county of the county in which the hospital, clinic, or other facility in which the abortion would be performed or induced is located, requesting the issuance of an order authorizing her to consent to the performance or inducement of an abortion without the notification of her parents, guardian, or custodian.

"The complaint shall be made under oath and shall include all of the following:

"(1) A statement that the complainant is pregnant;

"(2) A statement that the complainant is unmarried, under eighteen years of age, and unemancipated;

"(3) A statement that the complainant wishes to have an abortion without the notification of her parents, guardian, or custodian;

"(4) An allegation of either or both of the following:

"(a) That the complainant is sufficiently mature and well enough informed to intelligently decide whether to have an abortion without the notification of her parents, guardian, or custodian;

"(b) That one or both of her parents, her guardian, or her custodian was engaged in a pattern of physical, sexual, or emotional abuse against her, or that the notification of her parents, guardian, or custodian otherwise is not in her best interest.

". . .

"(C)(1) If the complainant makes only the allegation set forth in division (A)(4)(a) of this section and if the court finds, by clear and convincing evidence, that the complainant is sufficiently mature and well enough informed to decided intelligently whether to have an abortion, the court shall issue an order authorizing the complainant to consent to the performance or inducement of an abortion without the notification of her parents, guardian, or custodian. If the court does not make the finding specified in this division, it shall dismiss the complaint.

"(2) If the complainant makes only the allegation set forth in division (A)(4)(b) of this section and if the court finds, by clear and convincing evidence, that there is evidence of a pattern of physical, sexual, or emotional abuse of the complainant by one or both of her parents, her guardian, or custodian of the complainant otherwise is not in the best interest of the complainant, the court shall issue an order authorizing the complainant to consent to the performance or inducement of an abortion without the notification of her parents, guardian, or custodian. If the court does not make the finding specified in this division, it shall dismiss the complaint.

"(3) If the complainant makes both of the allegations set forth in divisions (A)(4)(a) and (b) of this section, the court shall proceed as follows:

"(a) The court first shall determine whether it can make the finding specified in division (C)(1) of this section and, if so, shall issue an order pursuant to that division. If the court issues such an order, it shall not proceed pursuant to division (C)(3)(b) of this section. If the court does not make the finding specified in division (C)(1) of this section, it shall proceed pursuant to division (C)(3)(b) of this section.

"(b) If the court pursuant to division (C)(3)(a) of this section does not make the finding specified in division (C)(1) of this section, it shall proceed to determine whether it can make the finding specified in division (C)(2) of this section, and if so, shall issue an order pursuant to that division. If the court does not make the finding specified in division (C)(2) of this section, it shall dismiss the complaint."

Last year, the United States Supreme Court upheld the facial validity of R.C. 2151.85 on Fourteenth Amendment due process grounds. *Ohio v. Akron Center for Reproductive Health* (1990), 497 U.S. __, 111 L. Ed. 2d 405, 110 S. Ct. 2972.

A review of the foregoing statutory framework reveals that the juvenile court is vested with a certain amount of discretion in determining whether the minor is sufficiently mature to make the decision to terminate a pregnancy without parental notification, and/or whether parental notification of the minor's desire to obtain an abortion would be in her best interest. While the correctness of a juvenile court's dismissal of a complaint brought under R.C. 2151.85 must be scrutinized on a case-by-case basis, a reviewing court must evaluate the trial court's determination under an abuse of discretion standard. As this court defined this standard, "the term 'abuse of discretion' connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. . . ." *State v. Adams* (1980), 62 Ohio St. 2d 151, 157, 16 O.O. 3d 169, 173, 404 N.E. 2d 144, 149. *See, also, Blakemore v. Blakemore* (1983), 5 Ohio St. 3d 217, 5 OBR 481, 450 N.E. 2d 1140.

When applying the abuse of discretion standard, a reviewing court is not free to merely substitute its judgment for that of the

trial court. *Berk v. Matthews* (1990), 53 Ohio St. 3d 161, 169, 559, N.E. 2d 1301, 1308.

Above all, a reviewing court should be guided by a presumption that the findings of a trial court are correct, since the trial judge ". . . is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony. . . ." *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St. 3d 77, 80, 10 OBR 408, 410, 461 N.E. 2d 1273, 1276.

In reviewing the testimony proffered in the cause sub judice under this standard, we believe that the trial judge did not abuse his discretion in finding that appellant did not sustain her burden in proving, by clear and convincing evidence, the allegations outlined in R.C. 2151.85(A)(4)(a) or (A)(4)(b).

With regard to the allegation made by appellant that she is sufficiently mature and well enough informed to decide whether to have an abortion without parental notification, the trial court had several factors to weigh as proffered by appellant and Dr. Rauh. On the one hand, appellant is a senior in high school who plans to attend college, and is a person who had a prior experience in the termination of a pregnancy. On the other hand, appellant testified that she had an abortion in June 1990, and is seeking to have another one performed less than a year later. Moreover, appellant testified that each pregnancy was the result of intercourse with a different man. In addition, Dr. Rauh testified that appellant was on a program of birth control, but discontinued it. In light of the foregoing testimony, it was not unreasonable, arbitrary or unconscionable for the trial judge to dismiss the complaint by essentially finding that appellant did not prove her "maturity" allegation by clear and convincing evidence.

With respect to the second allegation in appellant's complaint and at the hearing, i.e. that parental notification would not be in her best interest, or that her father was engaged in a pattern of physical and emotional abuse against her, there was relatively little testimony proffered before the court. While appellant testified that her father threatened to not support her if she ever got pregnant, and that he struck her on two occa-

sions—once for coming home late when she was thirteen or fourteen and another time for getting bad grades on her report card—we do not believe that the trial judge abused his discretion in finding that this did not indicate a pattern of physical, sexual or emotional abuse by either parent, or that parental notification was otherwise not in appellant's best interest. In sum, such evidence, as held by the trial court, was not clear and convincing in establishing the necessity to dispense with parental notification.

Lastly, we note that appellant urges this court to adopt what is essentially a six-factor test for juvenile courts to weigh as factors that are "indicative of a minor's maturity or competence to give informed consent"[2] While appellant's proposal appears comprehensive in spelling out the various factors that juvenile court judges would in all likelihood consider when evaluating a complaint brought under R.C. 2151.85, we decline to expand the statutory parameters enacted by the General Assembly, since such expansion would clearly involve a legislative function.

Based on all of the foregoing, we hold that absent an abuse of discretion by the juvenile court, the dismissal of a complaint brought by an unemancipated pregnant minor seeking authorization to have an abortion pursuant to R.C. 2151.85 shall not be disturbed.

Accordingly, the judgment of the court of appeals is hereby affirmed.

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[2] Appellant's proposed factors are as follows:

"a. Age. Minors fifteen and older should generally be held to possess sufficient maturity to consent to their own abortion without notice to the parent;

"b. Overall intelligence. The minor should possess sufficient intelligence to understand her situation and her options;

"c. Ability to accept responsibility. Examples could be drawn from life at home, in school or elsewhere;

"d. Ability to assess the future impact of her present choices;

"e. Whether the minor is making an affirmative personal decision and not being forced into her decision by a third person;

"f. Whether the minor will understand the benefits and risks of the abortion procedure and apply that understanding when making her decision."

WRIGHT, J., concurring:

Appellant's proposed criteria (b) through (f) for evaluating a complaint brought under R.C. 2151.85 seem to be appropriate. My review of the record using these criteria and other common-sense factors does not disclose an abuse of discretion by the trial court. Accordingly, I concur with the syllabus law and result announced today.

MOYER C.J., dissenting:

The majority holds that the trial court did not abuse its discretion in refusing to allow Jane Doe to have an abortion without parental notification pursuant to R.C. 2151.85, and that to provide a test for juvenile courts to use in determining a minor's maturity and competence "would clearly involve a legislative function." For the reasons that follow, I must respectfully dissent.

The lead opinion states that we must determine whether the trial court abused its discretion in finding that appellant did not prove by clear and convincing evidence that she met the two requirements of the statute that she is sufficiently mature and well enough informed to decide whether to have an abortion without parental notification, and/or that parental notification of her desire to have an abortion is not in her best interest.

The plurality then declines "to expand the statutory parameters enacted by the General Assembly, since such expansion would clearly involve a legislative function." It is the opinion of the plurality that this court should not provide a test for juvenile courts to use as they apply R.C. 2151.85 to specific cases.

It is difficult to imagine a case that would provide this court with a more significant opportunity to assist trial courts in exercising their discretion under a statute than this case. Because I believe that an important responsibility of this court is to assist trial courts in applying the statutorily undefined term "sufficiently mature," I would urge this court to adopt the

following factors or indicia of a minor's maturity: (1) age, (2) overall intelligence, (3) emotional stability, (4) credibility and demeanor as a witness, (5) ability to accept responsibility, (6) ability to assess the future impact of her present choices, (7) ability to understand the medical consequences of abortion and apply that understanding to her decision, and (8) any undue influence by another on the minor's decision.

These factors are the same factors referred to in Justice Brown's dissent and that have been adopted by the Superior Court of the Commonwealth of Massachusetts, which has reviewed a parental notification statute similar to R.C. 2151.85.

Regrettably, we have passed an opportunity to assist trial courts of our state in determining the numerous cases that will be filed under a new statute in a difficult area of the law.

If the standards proposed by Justice Brown and by this dissent were to be applied to the facts in this case, I would reverse the judgment of the court of appeals and remand the case to the trial court for further proceedings. I find no evidence in the transcript relating to and no indication that the trial judge considered the question of whether Jane Doe acted under any undue influence by another upon her decision. It is possible to imply that she did not act under undue influence. However, in a case of this nature, it is important that such evidence be direct and that the record reflects that is was considered by the court.

DOUGLAS, J., dissenting:

I respectfully dissent from the majority decision because I believe that this court has missed its first (and now maybe only) opportunity to reconcile conflicting decisions and interpretations from various district courts of appeals on the serious question presented. It goes without argument, of course, that one of this court's primary responsibilities is to settle conflicts between the districts and to set guidelines for the bench and bar on matters of great general interest and statewide concern. The matter before us is just such an issue.

While some would like to make this case one of pro-abortion versus anti-abortion or pro-choice versus pro-life, it is nothing of the sort. What we have before us is a case of statutory interpretation—and only statutory interpretation. The issue of whether abortion is lawful has been decided by the United States Supreme Court in *Roe v. Wade* (1973), 410 U.S. 113, and unless and until that court does something different with that case, this court is bound by the precedent established. Likewise, the General Assembly of Ohio now also has the power, legislatively, to determine the issue. *See Webster v. Reproductive Health Services* (1989), 492 U.S. __, 106 L. Ed. 2d 410, 109 S. Ct. 3040. To date, the General Assembly has taken no action.

Since under present law there is a constitutional right to terminate a pregnancy and that right was being exercised, without parental notification, by young women below the age of eighteen years, the General Assembly of Ohio, in its infinite wisdom, determined that parental notification should be required before such pregnancy could be terminated. In pursuance thereof, the General Assembly enacted R.C. 2919.12(B)(1)(a), which provides that: "No person shall knowingly perform or induce an abortion upon a woman who is pregnant, unmarried, under eighteen years of age, and unemancipated . . ." unless at least one of several exceptions is satisfied.

One of the exceptions is found in R.C. 2919.12(B)(1)(a)(iii) and provides that parental notification is not necessary if "[a] juvenile court pursuant to section 2151.85 of the Revised Code issues an order authorizing the woman to consent to the abortion without notification of one of her parents, her guardian, or her custodian[.]"

In *Bellotti v. Baird* (1979), 443 U.S. 622, the court set forth requirements that must be satisfied before legislation providing procedures for bypassing parental involvement would meet constitutional muster. The court said that any such legislation for a bypass procedure must allow the minor to show that she possesses the maturity and information to make her abortion decision, in consultation with her physician, without regard to her parents' wishes. *Id.* at 643. Further, the court said that even

if the minor is not mature enough to make the abortion decision herself, then the bypass procedure must allow for a court to determine whether an abortion without parental intervention would be in the minor's best interest. *Id.* at 644.

Recognizing these requirements, the Ohio General Assembly enacted R.C. 2151.85, which gives a minor the option of seeking the approval of a juvenile court in order to bypass parental notification. R.C. 2151.85 was enacted to meet the exception provided for in R.C. 2919.12(b)(1)(a)(iii). R.C. 2151.85 has the two prongs required by Bellotti and was found to meet constitutional muster in the case of *Ohio v. Akron Center for Reproductive Health* (1990), 497 U.S. __, 111 L. Ed. 2d 405, 110 S. Ct. 2972.

It is this statute, R.C. 2151.85, that we are called upon to interpret and to set standards and guidelines to assure its statewide consistent interpretation. I find that it is not only necessary—it is urgent that we do so. We have now seen cases from at least Cuyahoga, Hamilton and Lucas Counties and we have seen at least three different interpretations of how the statute is to be applied. That is why I feel so strongly that we must set standards that will aid our trial courts and courts of appeals in their very delicate and difficult deliberations.

Justice Brown has ably discussed, in his dissenting opinion, the need for standards to be set for the way in which "maturity" (the first prong of the statute) should be determined. He has suggested a litany of eight factors that should and/or could be considered. I concur in his discussion of this first prong of the bypass statute.

The second prong specifically applies to the minor's "best interest." The complaint of the minor must allege this second prong in order for the issue to be before the court. R.C. 2151.85(C). Of course, if a minor is found to have satisfied the first prong, then the second prong is never reached. If, however, the minor alleges both prongs, but does not meet the "maturity" standard, then trial court is required to determine whether an abortion without parental involvement would be in the minor's "best interest." R.C. 2151.85(C)(3)(b). Jane Doe placed in issue the second prong of the statute.

In the case at bar, the record shows that the only testimony[1] before the court relating to this second prong was that Jane Doe's father had a prior history of violence when he became upset with Jane's conduct. He had specifically warned her that he would cut off her support if she ever got pregnant. By Jane's testimony it was established that her father had once struck her so hard that bruises were left on her body. This was when she had come home late. Her father also struck her when she received "Ds" on her report card. If her father cuts off her financial support, it will, Jane says, probably cause her to leave home, secure full-time employment and possibly leave high school and give up or at least delay her plans for further education. Jane testified that if her father discovered that she was pregnant and that she desired an abortion, there was ". . . no telling what he would do to me. I mean, I know he would probably beat me 'cause he has in the past. But that was over something minor. And for something this big to happen, he would respond in the same way."

From this record, it is difficult to see how the "best interest" prong of the statute was not satisfied. In any event, we should set forth these procedures so as to promote as clear an understanding of R.C. 2151.85 as is possible.

Because the lead opinion fails to set forth standards for the uniform application of the statute throughout this state and for the guidance of those who have to make these difficult decisions before they reach this court, I respectfully dissent.

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[1] I recognize, of course, that by necessity there probably would not be any opposing testimony available and, therefore, the evidence should be clear and convincing that parental notification would not be in the best interest of the minor. Again, it must be the trial judge that makes the determination as to the credibility and weight of the evidence presented.

H. BROWN, J., dissenting:

R.C. 2151.85 provides that an unemancipated female minor may have an abortion without informing her parents if she proves by clear and convincing evidence, R.C. 2151.85(C)(1), that she "is sufficiently mature and well enough informed to intelligently decide to have an abortion without the notification of her parents, guardian, or custodian," R.C. 2151.85(A)(4)(a). This requirement was held to be constitutional by the United States Supreme Court in *Ohio v. Akron Center for Reproductive Health* (1990), 497 U.S. __, 111 L. Ed. 2d 405, 110 S. Ct. 2972. Since then, the juvenile and appellate courts of this state have struggled, without the benefit of a standard from this court, to determine if the minor is "sufficiently mature."

In this case, we are presented with the opportunity to provide guidance to the lower courts. Such guidance is necessary in order to develop a record (in future cases) which will allow for meaningful appellate review.

In this case, the majority has found no abuse of discretion in the finding below that "Jane Doe" was not "sufficiently mature" under R.C. 2151.85(C)(1). Presumably, the majority did not reach this determination out of thin air. Presumably, the majority used some standard. Thus, it troubles me that the majority refuses to articulate the standard (whatever it may be) on which it has resolved the case. I fear that the standard—which the majority has used but will not reveal—does violence to both the legislative intent of the relevant statute and to the constitutional rights of the appellant.

Because the majority has failed to articulate a standard, and because the majority has upheld a decision which I believe to be an abuse of discretion, I must respectfully dissent.

I

Standard for Determining Maturity

In enacting R.C. 2151.85(A)(4)(a), the General Assembly recognized that, while most minors would benefit from the "guidance and understanding" of their parents, *Akron Center*,

supra at ___, 111 L. Ed. 2d at 424, 110 S. Ct. at 2984, some are mature enough to be able to make the abortion decision alone.

The determination of whether a minor is "mature" should be made based on how she has conducted her entire life, and not just on the events which have brought her into court. While maturity cannot be determined by resort to a simple, bright-line test, it is possible to identify certain factors which are indicia of maturity, and which may be used to focus the inquiry. These are: (1) the minor's age,[1] (2) overall intelligence, (3) emotional stability, (4) credibility and demeanor as a witness, (5) ability to accept responsibility, (6) ability to assess the future impact of her present choices, (7) ability to understand the medical consequences of abortion and apply that understanding to her decision, and (8) any undue influence by another on the minor's decision.

No one of these factors is, by itself, dispositive, and its relative importance will vary from case to case. In some cases, there will be other areas, not listed here, into which the court will need to inquire. The juvenile court has a responsibility to insure that the relevant facts are fully developed in the record so that it can make an informed determination. *Cf. Matter of Mary Moe* (1988), 26 Mass. App. 915, 916, 523 N.E. 2d 794, 795 (court erred in refusing to hear evidence on minor's medical condition before determining if waiver was in her best interests). A meaningful record cannot be developed when we refuse to articulate the factors which must be considered in making a "maturity" decision.

II

Necessity of a Written Opinion

In the instant case, the trial court, after making its findings, simply stated that the complaint would be dismissed, and the court of appeals affirmed without stating its reasoning, other

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[1] While age should be considered as a possible indicator of maturity, I would not adopt appellant's proposal that minors aged fifteen or over generally be presumed "sufficiently mature." Such a presumption would cancel the notification requirement by judicial fiat, contrary to the intent of the General Assembly.

than to say, "that the evidence herein does support the trial court's findings . . . ." Conclusory statements such as these give us little on which to base our review. If the application is denied at any level, the court should be required to set forth its findings, reasoning, and conclusions in a written opinion.

In *State, ex rel. Noll, v. Indus. Comm.* (1991), 57 Ohio St. 3d 203, 567 N.E. 2d 245, we criticized the Industrial Commis-sion for falling into a practice of making "formal, boilerplate incantations" which provided no insight into why a particular claimant was granted or denied benefits. We said:

"The time has come for the commission to recognize its responsibility to prepare fact-specific orders which will be meaningful upon review. It is well settled that the commission has the exclusive authority to determine disputed facts and weight of the evidence. . . . [Citations omitted.] However, a meaningful review can be accomplished only if the commission prepares orders on a case-by-case basis which are fact-specific and which contain reasons explaining its decision. . . ." (Emphasis added.) *Id.* at 206, 567 N.E. 2d at 248-249. This principle is no less applicable to cases brought under R.C. 2151.85, and is even more compelling given the limited time which courts have to consider these cases.

III

Merits of the Instant Case

As the majority notes, the record indicates that Jane Doe is a seventeen-year-old high school senior. She works twenty-five hours per week, and pays for her automobile and telephone expenses, and medical care. She is active in team sports, yet she has been able to maintain a 3.0 grade point average. She is preparing to attend college.

Courts in other states with similar statutes have found minors to be "sufficiently mature" on less evidence of maturity. *See, e.g., Matter of Anonymous* (Ala. Civ. App. 1987), 515 So. 1254 (seventeen-year-old dropout with fulltime job planning to take GED). Yet, without elaboration, the majority concludes that this overwhelming evidence of maturity is outweighed by the

tragic fact that this is Jane Doe's second unwanted pregnancy. I cannot agree. If the fact of suffering an unwanted pregnancy can be characterized as "immature" and then used to outweigh any amount of evidence to the contrary, there is no point to the statutory exemption from parental notification. The record before us clearly and convincingly shows that Jane Doe is "sufficiently mature" within the meaning of R.C. 2151.85(A)(4)(a). If she is not a "mature minor," then who is?

Accordingly, I would reverse the judgment of the court below and grant Jane Doe's application.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

CASE NO. 1:92 CV 1194

Filed June 17, 1992

CLEVELAND SURGI-CENTER INC., 5 Severance Circle, Suite 611, Cleveland Heights, OH 44118; PLANNED PARENTHOOD ASSOCIATION OF CINCINNATI, 2314 Auburn Avenue, Cincinnati, OH 45219; AKRON CENTER FOR REPRODUCTIVE HEALTH INC., 839 E. Market Street, Akron, OH 44305; WOMEN'S PAVILLION, INC. d/b/a CENTER FOR CHOICE II, 16 N. Huron Street, Toledo, OH 43604; Ohio Corporations; WOMEN'S MED + CENTER, LTD., d/b/a WOMEN'S MED + CENTER OF DAYTON, 1401 Stroop Road, Kettering, OH 45429, an Ohio Limited Partnership; LEE I. RUBINSTEIN, M.D., 5 Severance Circle, Suite 611, Cleveland Heights, OH 44118, individually and on behalf of their patients,

Plaintiffs,

—v.—

STEPHANIE TUBBS JONES, Courts Tower, Justice Center, 1200 Ontario Street, Cleveland, OH 44113, as Cuyahoga County Prosecutor and KIM SEGEBARTH, 40 Severance Circle, Cleveland Hts. OH 44118-9988, as Prosecutor for the City of Cleveland Heights, in their official capacities and as representatives of the class of public officials empowered to enforce the provisions of Ohio Rev. Code § 2919.12,

Defendants.

CLASS ACTION COMPLAINT

DOWD, J.

I. PRELIMINARY STATEMENT

1. This is a federal civil rights action pursuant to 42 U.S.C. § 1983 and the United States Constitution in which plaintiffs seek declaratory and injunctive relief against further enforcement of the Ohio statute which imposes criminal and civil sanctions on any person who performs or induces an abortion upon an unmarried, unemancipated minor unless that person has first notified a parent, custodian or guardian of the minor or the minor has obtained a waiver of notification ("judicial bypass") from an Ohio juvenile court. This parental notification legislation is codified at Ohio Rev. Code §§ 2151.85, 2919.12 and 2505.073 ("the statute").

The statute has been implemented in an unconstitutional manner. Specifically, the judicial bypass has been implemented in a way that allows, and has resulted in, the arbitrary and capricious denial of the constitutional rights of some minors to waiver of the notification requirement. (See Exhibit A). Accordingly, plaintiffs seek declaratory and injunctive relief against further enforcement of the notification requirement.

II. JURISDICTION AND VENUE

2. Plaintiffs' complaint seeks to enforce rights guaranteed by the United States Constitution and is brought pursuant to 42 U.S.C. § 1983. This court has jurisdiction of such claims pursuant to 28 U.S.C. §§ 1343(3); 1343(4); and 28 U.S.C. § 1331. Declaratory relief is authorized pursuant to 28 U.S.C. §§ 2201 and 2202.

3. Venue in this District and Division is proper under 28 U.S.C. § 1391(b)(1) because the named defendants, in their official capacities, reside in Cuyahoga County, Ohio.

III. PARTIES

4. Plaintiff Cleveland Surgi-Center ("Surgi-Center") is a professional corporation incorporated under the laws of the State of Ohio. It operates and maintains a clinic in Cuyahoga County, Ohio, which offers a variety of reproductive health care services, including abortions. Surgi-Center provides counseling to women, including unemancipated minors, concerning their rights relative to the procurement of an abortion, the procedures involved in an abortion, and the alternatives to abortion. Surgi-Center provides abortions to unemancipated minors many of whom are capable of giving informed consent or whose best interests would not be served by notice to a parent or, if applicable, to a legal guardian.

5. Plaintiff Parenthood Association of Cincinnati ("PPAC") is a non-profit corporation licensed under the laws of the State of Ohio. It operates and maintains a clinic in Hamilton County, Ohio, which offers a variety of reproductive health care services, including abortions. PPAC provides counseling to women, including unemancipated minors, concerning their rights relative to the procurement of an abortion, the procedures involved in an abortion, and the alternatives to abortion. PPAC provides abortions to unemancipated minors many of whom are capable of giving informed consent or whose best interests would not be served by notice to a parent or, if applicable, to a legal guardian.

6. Plaintiff Akron Center For Reproductive Health, Inc. ("Akron Center") is a professional corporation incorporated under the laws of the State of Ohio. It operates and maintains a clinic in Summit County, Ohio, which offers a variety of reproductive health care services, including abortions. Akron Center provides counseling to women, including unemancipated minors, concerning their rights relative to the procurement of an abortion, the procedures involved in an abortion, and the alternatives to abortion. Akron Center provides abortions to unemancipated minors many of whom are capable of giving informed consent or whose best interests would not be

served by notice to a parent or, if applicable, to a legal guardian.

7. Plaintiff Women's Pavillion, Inc., d/b/a Center for Choice II ("Choice") is a professional corporation incorporated under the laws of the State of Ohio. It operates and maintains a clinic in Lucas County, Ohio, which offers a variety of reproductive health care services, including abortions. Choice provides counseling to women, including unemancipated minors, concerning their rights relative to the procurement of an abortion, the procedures involved in an abortion, and the alternatives to abortion. Choice provides abortions to unemancipated minors many of whom are capable of giving informed consent or whose best interests would not be served by notice to a parent or, if applicable, to a legal guardian.

8. Plaintiff Women's Med + Center, Ltd. d/b/a Women's Med + Center of Dayton ("Med +") is a limited partnership organized under the laws of the State of Ohio. It operates and maintains a clinic in Montgomery County, Ohio, which offers a variety of reproductive health care services, including abortions. Med + provides counseling to women, including unemancipated minors, concerning their rights relative to the procurement of an abortion, the procedures involved in an abortion, and the alternatives to abortion. Med + provides abortions to unemancipated minors many of whom are capable of giving informed consent or whose best interests would not be served by notice to a parent or, if applicable, to a legal guardian.

9. Plaintiff Lee I. Rubinstein, M.D., is a citizen of the United States and resides in Cuyahoga County, Ohio. He is the Medical Director of Cleveland Surgi-Center, Inc., and is a duly licensed physician board certified in obstetrics and gynecology. Dr. Rubinstein is presently engaged in the practice of gynecology and performs abortions at the Cleveland Surgi-Center. His patients include unemancipated minors, many of whom are capable of giving informed consent or whose best interests would not be served by notice to a parent or, if applicable, to a legal guardian.

10. Plaintiffs sue on their own behalfs, and on behalf of their unemancipated minor patients who desire abortions and who are capable of giving informed consent to an abortion procedure or whose best interests will not be served by notice to a parent or, if applicable, to a legal guardian.

11. Defendant Stephanie Tubbs Jones is the Prosecuting Attorney of Cuyahoga County, Ohio. In her official capacity, she is responsible for the enforcement in Cuyahoga County of the laws of the State of Ohio, including the statute.

12. Defendant Kim Segebarth is the Prosecutor for the City of Cleveland Heights, Ohio. In his official capacity, he is responsible for the enforcement in the City of Cleveland Heights of the laws of the State of Ohio, including the statute. Defendant Segebarth is sued in his official capacity.

IV. Defendant Class Allegations

13. Defendants are also sued as representatives of a class of all prosecuting attorneys in Ohio empowered to enforce the statute.

14. The membership of the defendant class is so numerous and ever-changing that joinder of all members is impractical. There are questions of law or fact common to the class and the defenses of these defendants are typical of those of the class. The named defendants can fairly and adequately represent the interests of all members of the class.

15. The defense of separate actions by individual class members would create a risk of inconsistent adjudications or adjudications dispositive of the rights and obligations of class members. The defendants or their counterparts in cities and other counties of the State of Ohio have acted or will act on grounds generally applicable to the class, thereby making appropriate final declaratory and injunctive relief with respect to the class as a whole.

V. FACTUAL ALLEGATIONS

16. The statute empowers the Juvenile Courts to grant a waiver of parental notification if a minor seeking an abortion is determined to be "mature" or such notification would not be in her "best interests." The statute sets no standards for these issues and the Ohio state courts have been applying dramatically different standards to these issues.

17. In *In re Jane Doe*, 57 Ohio St. 3d 135 (1991) (" '*Jane Doe I*'), the Ohio Supreme Court affirmed the denial of a waiver of notice sought by a minor who was: 17 years old, and a high school senior with a 3.0 grade point average. She participated in sports, worked part-time jobs, was responsible for her own medical care, and had selected a college for further education. Moreover, she had had an abortion previously with the cooperation of her mother. Her mother had warned that a second pregnancy would result in notice to her father and her father had beat her twice in the past for minor infractions.

18. At the time of the decision in *Jane Doe I*, there were decisions from three courts demonstrating three different interpretations of how the statute is to be applied.

19. The *Jane Doe I* opinion explicitly refused to issue any standards to guide or constrain the lower courts. It declared that to be a legislative function.

20. The opinion explicitly approved of consideration, as weighing against maturity, of factors relating to a minor's sexual activity, such as that the minor in *Jane Doe I* had an abortion within the preceding year, and that the two pregnancies were the results of intercourse with different men.

21. The *Jane Doe I* opinion also held that the standard of appellate review in judicial bypass cases was "abuse of discretion," a very broad standard under Ohio law, and that the Juvenile Court was not required to issue any written findings of fact.

22. Absent legislation, *Jane Doe I* is the final statement on the implementation of the statute's judicial bypass: there are to

be no standards defining maturity or best interests, and thereby constraining the power of the courts; evidence of sexual conduct may be a factor weighed against the minor seeking a waiver of notice; the Juvenile Courts need not issue written findings of fact, or explanations of reasons; and Juvenile Court decisions are to be reviewed by an abuse of discretion standard.

23. This implementation of the statute's judicial bypass, particularly when coupled with the clear and convincing evidence burden of proof imposed on the minor, allows and has regularly resulted in the arbitrary denial of waivers of notice to minors who were constitutionally entitled not to be forced to notify their parents.

24. For example, a nearly 18-year-old minor petitioned the Juvenile Court in Cuyahoga County for a waiver of the notification requirement. ("*Jane Doe II*".) The Juvenile Court held that this minor was not sufficiently mature for the sole reason that she did not want to discuss her abortion decision with her parents. The Court reasoned that a mature minor would accept the consequences of her actions and disclose the matter to her parents. The Court of Appeals of Cuyahoga County affirmed the Juvenile Court's denial of the waiver.

25. Similarly, the Court of Appeals in Montgomery County in *In re Jane Doe*, No. CA 0001 (Ohio Ct. App. May 30, 1991) (Westlaw 1991 WL 96269 (Ohio App.)) ("*Jane Doe III*") affirmed a Juvenile Court decision denying the petition of a minor who was nearly 17 years old at the time of the hearing. She was a sophomore in high school with college aspirations, who testified that she could not go to college while raising a baby. She had been raised in foster homes during the preceding three years with little contact with her parents. Relying on *Jane Doe I*, the Court of Appeals, with a dissent, found that the Juvenile Court had not abused its discretion.

26. In April, 1991, the Juvenile Court of Lucas County denied the petition of a minor ("*Jane Doe IV*") on the grounds that her failure to file a paternity action against the father of her three-month-old son demonstrated a lack of maturity. Jane Doe

IV was 17-$^1/_2$ years old at the time, and the mother of an infant son. She was attending high school and employed part-time. She resided with her grandmother and paid her own room and board.

27. Also in April, 1991, the Juvenile Court of Lucas County denied a minor's ("*Jane Doe V*") petition because, the presiding judge stated off the record to Jane Doe V's attorney, she had not had enough "hard knocks." Jane Doe V was 17-$^1/_2$ years old, an "A" student active in her high school's activities. She planned to go to college and testified that she would be unable to do so if she had a child at that time.

28. In January 1992, the Juvenile Branch of the Franklin County Domestic Relations Court denied a minor's ("*Jane Doe VI*") petition without any explanation on the record. In an unreported ruling, a divided panel of the appellate court affirmed the Franklin County Court's decision. Jane Doe VI was 17-$^1/_2$ years old, a high school student in good standing and had been accepted to college for the fall semester of 1992.

29. The Ohio courts have continued to decide the maturity and best interests issues arbitrarily and inconsistently, resulting in the loss by many minors of the constitutional right not to be required to notify their parents. (See Exhibit A).

30. Plaintiffs' minor patients, who seek an abortion in the State of Ohio and do not wish to notify their parents, have a well-based fear that the statute, as implemented, may expose them to the unbridled discretion, whim and caprice of the judge who hears the case and who may deprive them of their constitutional right to reproductive freedom.

31. Continued arbitrary and capricious implementation of the statute across this state will cause plaintiffs' minor patients to suffer the deprivation of rights guaranteed under the United States Constitution, including the right of a woman to choose to terminate her pregnancy and to receive such medical services from her doctor without undue state interference. Further, plaintiffs must continue to refer mature minors and minors for whom parental notification of their abortion decisions is not in

their best interests to juvenile courts since providing services without parental notice, or a court order waiving notice, would cause plaintiffs to face civil and criminal sanctions.

VI. Cause of Action

32. Plaintiffs incorporate the allegations of paragraphs 1 through 31 as though fully written herein.

33. The statute, as implemented in Ohio, is unconstitutional under the fourteenth amendment to the United States Constitution. Continued enforcement of the statute by the defendants, acting under color of state law, will result in the deprivation of the constitutional rights of minors who are arbitrarily and capriciously denied a judicial waiver of the statutory notification requirement and in the imposition of criminal and civil sanctions on those persons who induce or perform an abortion on a minor who is sufficiently mature to make the decision to have an abortion, or for whom parental notification of her decision is not in her best interest, but who has been arbitrarily denied a judicial waiver of the notification requirement.

VII. Prayer for Relief

34. Wherefore, plaintiffs pray that this Court:

A. Declare the statute unconstitutional as implemented and enjoin it in its entirety because:

1. There are no standards governing the exercise of discretion when juvenile and appellate courts make determinations regarding "maturity" and "best interests";

2. Irrelevant unconstitutional factors have been considered in cases where petitions have been dismissed;

3. The lack of any requirement that factual findings and conclusions of law be made defeats meaningful appellate review;

4. The combination of the above factors renders a "clear and convincing evidence" standard for the minor seeking a judicial waiver of the notification requirement unduly burdensome;

5. There are no other adequate remedies at law and plaintiffs and their patients will be irreparably injured by continued implementation of the statute.

B. Issue a permanent injunction restraining defendant and the class she represents throughout Ohio from taking further action, including civil, criminal and administrative action toward enforcing the statute.

C. Award plaintiffs their costs and attorney's fees, pursuant to 42 U.S.C. § 1988.

D. Enter such other and further relief as the Court deems just and proper.

DATED: Cleveland, Ohio
June 17, 1992

Respectfully submitted,

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(2)

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No. 93-787

IN THE

Supreme Court of the United States

October Term, 1993

CLEVELAND SURGI-CENTER, INC., PLANNED PARENTHOOD ASSOCIATION OF CINCINNATI, AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., WOMEN'S PAVILLION, INC., D/B/A CENTER FOR CHOICE II, WOMEN'S MED & CENTER LTD., D/B/A WOMEN'S MED & CENTER OF DAYTON, and LEE I. RUBINSTEIN, M.D.,
Petitioners,

vs.

STEPHANIE TUBBS JONES and JOHN H. GIBBON,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondent is in general agreement with petitioners' statement of the case. There is one point petitioners omitted, however, that respondent believes should be mentioned. The District Court *did* indeed deny petitioners' Rule 59(e) motion to reconsider and alter or, alternatively, to amend the judgment, in which petitioners requested leave to file an amended complaint asserting petitioners' intent to violate the statute or to add or drop parties in accordance with the District Court's standing ruling. However, after finding "(i)t would be inappropriate for the Court to allow the plaintiffs to amend a complaint that has been dismissed on standing grounds," the District Court went on to note that the "case was *not* . . . dismissed on the merits. The plaintiffs are free to correct the standing deficiency and file a new case." Petitioners' appendix at 28a (emphasis added).

At that point petitioners had the option of filing a new complaint with additional parties to attempt to correct the standing deficiencies of the first complaint. Rather than pursue that option, petitioners chose to invoke the time and resources of the Sixth District Court of Appeals and, now, this Court. Respondent respectfully suggests that it would not be inappropriate for this Court, in determining whether to grant the writ, to consider the availability of such alternative remedies to petitioners.

REASONS FOR DENYING THE WRIT

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED AS THIS CASE INVOLVES ONLY THE APPLICATION OF SETTLED LEGAL PRINCIPLES AND IS IN HARMONY WITH THE DECISIONS OF THIS COURT AND OTHER CIRCUITS.

A. The Sixth Circuit Correctly Distinguished The Factual Allegations In This Case From Those Present In The Case Of *Planned Parenthood League v. Bellotti.*

As acknowledged by petitioners, the statutes at issue, Ohio Revised Code §§2151.85, 2919.12 and 2505.073 (hereinafter referred to as "the statute"), have been upheld by this Court in their entirety in a previous facial challenge to their constitutionality. *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990). Petitioners argue, however, that the statute has been applied in an arbitrary manner by the Ohio courts, depriving pregnant minors of their constitutional right to obtain abortions without parental consent. Pursuant to a decision of this Court which arguably left open the possibility of an operational challenge to a facially valid statute. *Bellotti v. Baird*, 443 U.S. 622, 645 n.25 (1979) ("*Bellotti II*") petitioners request that this Court declare the statute unconstitutional *as implemented* and enjoin enforcement in its entirety. Petitioners' appendix at 63a-64a. Petitioners cite the First Circuit's decision in *Planned Parenthood League v. Bellotti*, 868 F.2d 459 (1st Cir. 1989) ("*Bellotti IV*") as authority for their contention that petitioners, as medical care providers, have standing to bring this action.

Respondent believes that the Sixth Circuit correctly distinguished the claims in this case from the facts presented in *Bellotti IV*. In *Bellotti IV*, the plaintiffs

alleged that although the statute at issue on its face appeared to provide an adequate bypass procedure, its *implementation* had resulted in a *denial of access* to the judicial system due to delays in decision making and the refusal of some judges to hear petitions. By contrast, in the instant case, petitioners do not allege that pregnant minors in Ohio have been denied *access* to the judicial system. Rather, petitioners claim that some judges in Ohio are making *erroneous decisions* allegedly violating the pregnant minors' substantive due process rights.

To the extent the holding in *Bellotti IV* has any application to the instant case, it comports with the decision of the Sixth Circuit. In *Bellotti IV* the First Circuit held that the plaintiffs should have the opportunity to show that the statute as implemented did not provide minors access to the court system. But the Court went on to hold that the plaintiff would not be allowed to show, through operational data, that the two-parent consent requirement was unsupported by a compelling state interest. *Planned Parenthood League v. Bellotti*, 868 F.2d at 467-468. Such a challenge was precluded by this Court's previous decision in *Bellotti II* that the statute was facially constitutional. *Id.* at 468, citing *Bellotti v. Baird*, 443 U.S. at 637-38.

In a similar manner, petitioners, although ostensibly mounting an "as applied" challenge, are actually seeking to *relitigate* the issues already determined by this Court in *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990). The Sixth Circuit recognized as much when it noted that petitioners, in making their argument that the lack of standards in the statute had resulted in arbitrary decisions by state judges, appeared to be mounting a "vagueness challenge" to the statute. Petitioners' appendix at 9a. As noted by the Sixth Circuit, "vagueness challenges are facial challenges, and

such challenges are foreclosed here where the Supreme Court has held that the statute comports with due process on its face." *Id.*

The proper vehicle to raise a challenge such as that presented by petitioners is to seek review of state court decisions in which minor plaintiffs were denied permission to obtain abortions. For instance, it would have been appropriate to have appealed the Ohio Supreme Court's decision in *In Re Jane Doe* (1991), 57 Ohio St. 3d 135 to this Court. Petitioners claim that "(i)t is obviously impractical . . . to expect individual minors to litigate systematic abuses by carrying their waiver petitions not only through the entire state court appellate process but then, in search of federal court relief, by petition for certiorari to this Court." Petitioners' Brief at p. 12. However, expediency is not a basis for enlarging the jurisdiction of the federal courts.

Article III of the United States Constitution limits the judicial power of the United States to the resolution of "cases" or "controversies" and requires a showing that the plaintiff has suffered an injury which is "likely to be redressed by a favorable decision." *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 471-472 (1982) citing *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 39, 41 (1976). In this case, petitioners seek to have the federal courts enjoin enforcement of a constitutional statute based upon allegations that the state courts have, in some instances, applied the statute in an unconstitutional manner. The Sixth Circuit correctly ruled that the federal courts do not have the authority to grant petitioners the relief sought, and that petitioners therefore lack standing to bring this action.

B. The District Court And The Sixth Circuit Correctly Ruled That Petitioners Lacked Standing Because They Failed To Allege An Intent To Violate The Statute.

The District Court dismissed this action on the basis that petitioners, as medical care providers, lacked standing to bring an operational challenge as they failed to allege an intent to violate the statute. One of the Sixth Circuit judges affirmed on the same basis. The majority in the Sixth Circuit affirmed on a different basis, noting:

> We express no opinion on whether a physician's potential criminal liablity under an abortion law that has been upheld as facially valid is sufficient to confer standing in an as applied challenge. We hold only that the District Court erred in making plaintiffs' intent to violate the statute determinative of their standing to bring the action. (Petitioners' appendix at 41.)

Respondent submits that the decision of the lower court was in accord with both Sixth Circuit precedent and the principles enunciated by this Court, and was an appropriate basis upon which to dismiss the action.

This Court recently noted that in order to establish standing a plaintiff must demonstrate he has

> suffered an "injury in fact"—an invasion of a legally-protected interest which is (a) concrete and particularized . . . and (b) "actual or imminent, not 'conjectural' or 'hypothetical' ". (Citations omitted). *Lujan v. Defenders of Wildlife,* 112 S. Ct. 2130, 2136 (1992).

Respondent does not dispute petitioners' contention that the "threat of prosecution" may be sufficient "injury" in some circumstances to confer standing upon a party who

intends to engage in conduct prohibited by an allegedly unconstitutional statute.[1] However, in the instant case, petitioners do not allege sufficient facts to show they have suffered an "injury." Petitioners do not allege that they intend to violate the statute. They do not allege that they have had to deny any of their minor patients an abortion because of the failure of a juvenile court to grant a waiver.[2] The instant case is thus substantially similar to the case of *City of Akron v. Akron Center for Reproductive Health*, 651 F.2d 1198, 1211 (6th Cir. 1981), *aff'd in part, rev'd in part, City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983), in which the Sixth Circuit held that a physician who did not allege an intent to perform post-viability abortions had no standing to challenge an ordinance which prohibited such abortions.

As noted by the District Court, petitioners have failed to cite any case in which a party was found to have standing absent a declaration that he intended to engage in conduct in violation of the particular statute in question. Petitioners' appendix at 28a, footnote 2. Petitioners rely heavily upon *Doe v. Bolton*, 410 U.S. 179 (1973); however, that case never addressed the issues raised in this appeal, in that the *specific allegations* of the plaintiffs' complaint were not set forth in this Court's opinion or addressed by this Court. In the other cases previously cited by petitioners, the plaintiffs had

[1] Respondent, however, shares the concern of the Sixth Circuit as to whether standing could be established by petitioners in this case even by an allegation of intent to violate the statute, since the statute has already been ruled facially constitutional by this Court.

[2] The newspaper article attached to petitioners' complaint seems to indicate that the overwhelming number of bypass requests in Ohio have been granted. It further suggests some or all of the minors whose applications have been rejected are going to other counties and successfully obtaining waivers.

specifically alleged that they intended to engage in conduct in violation of a statute, or otherwise alleged facts to show concrete injury. *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502 (1990); *Singleton v. Wulff*, 428 U.S. 106 (1976).

Petitioners also have argued that they have standing to assert the rights of their minor patients irrespective of their own "injury" or lack thereof. However, this proposition is clearly contrary to established case law. If a party does not suffer any "injury in fact" from the operation of a statute or ordinance, he does not have a "sufficient concrete interest in the outcome" of the case to meet the Article III case or controversy requirement. *Akron Center for Reproductive Health, Inc. v. City of Akron*, 651 F.2d 1198, 1221 (6th Cir. 1981), citing *Singleton v. Wulff*, 428 U.S. 106 (1976). In such case, the party does not have standing to assert the rights of third parties. *Id.* Specifically, the Court ruled in the *Akron* case that a physician who lacks standing to challenge a law regulating abortion also lacks standing to assert the rights of his patients.

CONCLUSION

If the Sixth Circuit had *reversed* the District Court decision, then respondent agrees that this case would involve important constitutional issues, as such a decision would have expanded the Federal Courts' Article III jurisdiction far beyond any limits previously established by this Court. However, in *affirming* the District Court, the Sixth Circuit simply followed established precedent. There are no issues which warrant review by this Court.

For all of the reasons cited herein, respondent respectfully requests that the Court deny the petition for writ of certiorari.

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